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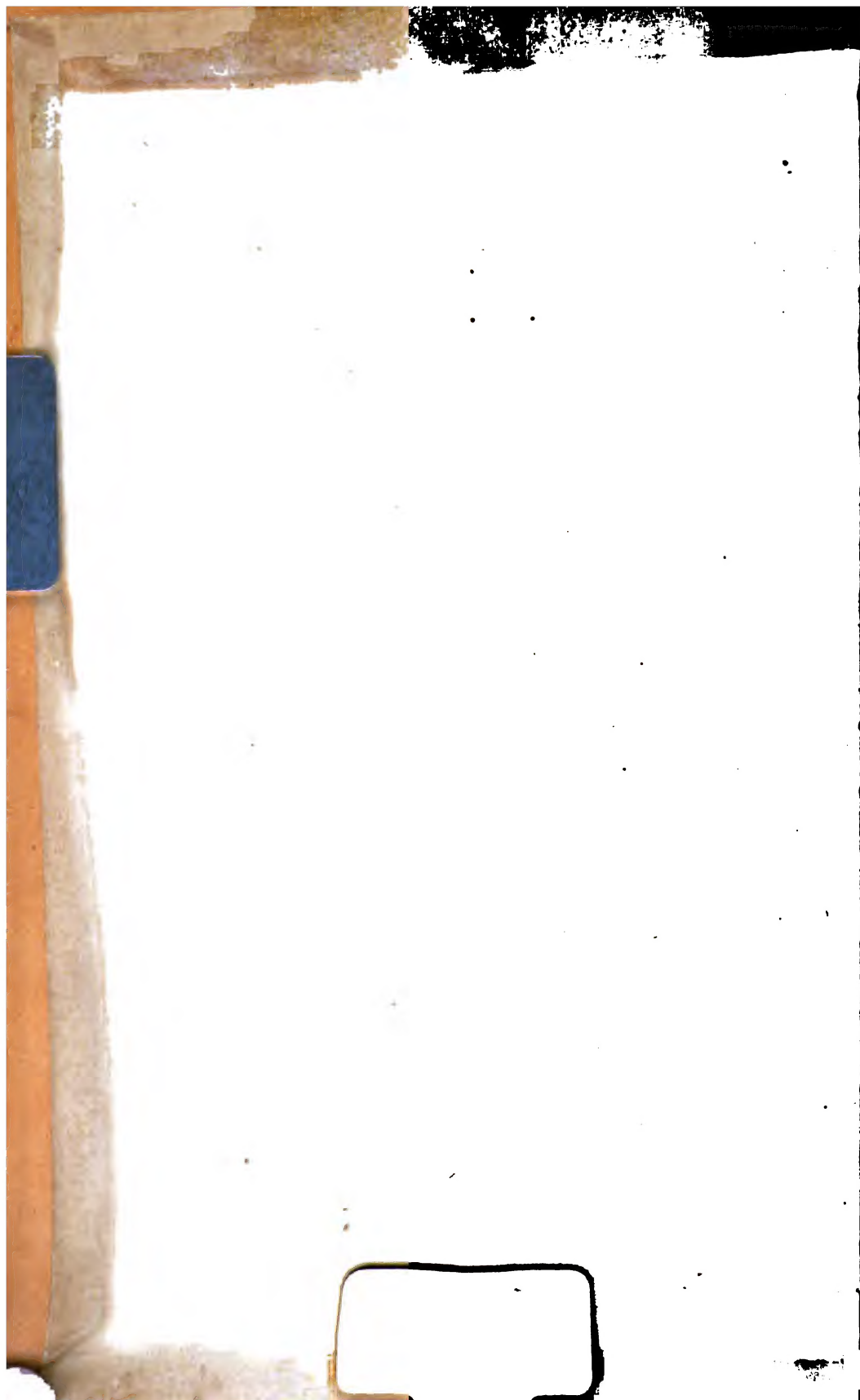
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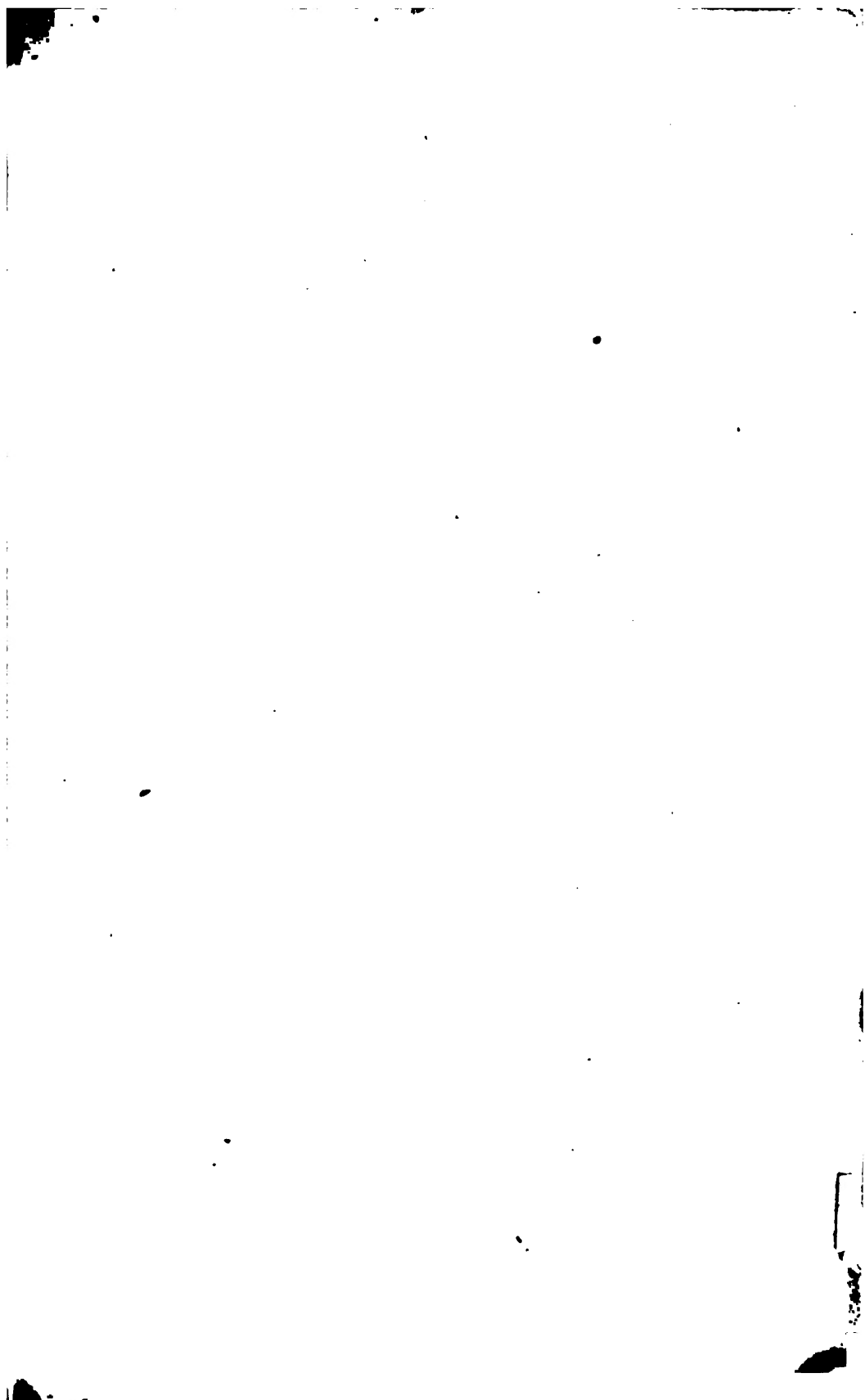
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REPORTS OF CASES
ADJUDGED IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW YORK;
FROM JANUARY TERM, 1799, TO JANUARY TERM, 1803, BOTH
INCLUSIVE;
TOGETHER WITH CASES DETERMINED IN THE
COURT FOR THE CORRECTION OF ERRORS,
DURING THAT PERIOD.

BY WILLIAM JOHNSON,
COUNSELLOR AT LAW.

Legum interpretes, iudices; legum denique idcirco omnes servi sumus, ut liberi esse possimus.—CICERO.

SECOND EDITION; WITH MANY ADDITIONAL CASES NOT INCLUDED IN
THE FORMER EDITION, FROM THE ORIGINAL NOTES OF THE LATE
HON. JACOB RADCLIFF, ONE OF THE JUDGES OF THE SUPREME
COURT DURING THE TIME OF THESE REPORTS.

WITH COPIOUS NOTES AND REFERENCES
TO THE AMERICAN AND ENGLISH DECISIONS.

BY LORENZO B. SHEPARD,
COUNSELLOR AT LAW.

VOLUME II.
CONTAINING THE CASES FROM OCTOBER TERM, 1800, TO OCTOBER
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NAMES
OF THE
JUDGES OF THE SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW YORK,
DURING THE TIME OF THE SECOND VOLUME OF THESE REPORTS.

JOHN LANSING, Esq. *Chief Justice*, resigned, on being
appointed *Chancellor*, October 28, 1801.

MORGAN LEWIS, Esq. appointed *Chief Justice*, October
28, 1801.

EGBERT BENSON, Esq. resigned March, 1801.

JAMES KENT, Esq.

JACOB RADCLIFF, Esq.

JOSIAH OGDEN HOFFMAN, Esq. *Attorney General*.



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CASES
ADJUDGED IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW YORK,
IN OCTOBER TERM, IN THE YEAR 1800.

TUNNO AND COX *against* LAGUE.

Where an *agent* receives a bill in order to obtain payment, he must send notice of non-acceptance and non-payment, with the protests to the remitter, whose duty it is to give immediate notice to the drawer.

If the *agent* himself undertakes to give notice to the drawer, it will be sufficient, if it be given as soon, as under the circumstances of the case, it could have been received from the holder.

The prevalence of a malignant fever in the city of New York, was held a sufficient excuse for not giving notice until November of a protest of non-payment made in September.

THIS was an action of *assumpsit*, against the defendant, as drawer of a bill of exchange, dated at Jeremie, April 29, 1798, on Malloby & Durand, of New York, in favor of the plaintiffs, for \$4866 76, payable sixty days after sight. On the 11th of July, 1798, the bill was presented to the drawees, and protested for non-acceptance, and on the 12th September, it was protested for non-payment.

At the trial, R. Lenox, a witness, testified that he was an agent for the plaintiffs, who reside in South Carolina, and received the bill from them; that the defendant, after drawing the bill, came to New York, and the witness, on the first opportunity, gave him notice of the non-acceptance, which was shortly before the 8th August; that the witness afterwards removed with his family into the country, on account of the yellow fever, which prevailed in the city, [*2]

Tunno and Cox v. Lague.

and in November, immediately after his return, gave notice of the non-payment to the defendant.

It appeared that the defendant was a married man, and had a house in New York ; that he went to St. Domingo on business, and returned to New York about the 1st of August, where he afterwards constantly and publicly resided.

A verdict was taken for the plaintiffs for the amount of the bill, with interest and damages, subject to the opinion of the court, on the point, whether due notice had been given to the drawer, of the non-acceptance and non-payment of the bill.

Troup, for the plaintiff.

Harison, for the defendant.

Per Curiam. The holder of a bill of exchange is bound to use due diligence to give notice of non-acceptance, as well as of non-payment, to the drawer or endorser whom he intends to charge. (5 Burr. 2670. 1 Term Rep. 714. Kyd, 76, 79.) Had Lenox been the real holder, he ought to have given notice of the non-acceptance to the drawer, before the 8th August, either at his dwelling house, or if his residence was not known, to have sent it to Jeremie, where the bill was drawn. The prevalence of the yellow fever would have been a sufficient excuse for a delay of notice of non-payment until November, as there was a stop to all business in the city.(a) But Lenox was an *agent* of the holder, and

(a) Any reasonable cause not attributable to the misconduct or negligence of the holder, will excuse delay in giving notice of dishonor and in presentment for acceptance or for payment, all of which cases are, in this respect, governed by the same general rules. Story on Bills, 258, 259, § 234. Id. 347, 351, § 308, 309. Id. 375, § 327. Inevitable accident is such a cause and excuses a delay as long as the circumstances compel, for *impossibilia nulla obligatio est*; as, for example, the death of a correspondent to whom the bill has been sent for presentment, the death or illness of the holder or his agent, a sudden illness happening to a messenger; (see Pothier de Change, pl. 144, and Pardessus Droit Comm. tom. 2, art. 426;) the prevalence of a malignant fever, (though it was otherwise decided in *Roosevelt v. Woodhull*, Anth. N. P. 35, 36, overruled by the principal case,) or a state of war between the country of the drawer and drawee, *Hopkirk v. Page*, 2 Brock. 20; and so where a bill drawn on Leghorn due the 10th September, 1800, was not demanded till the 31st December; Leghorn being then occupied by the enemy,

 Tunno and Cox v. Lague.

his duty extended no farther than to give notice to his principal, of the non-acceptance and non-payment, and to transmit the requisite protests, in order that the holder might give notice to the drawer.(b) As the drawer here had notice, be-

or in some such critical situation, and it was therefore impossible to present it in season. It was held, it being afterwards presented with due diligence and refused for want of presentation at the time when it was due, that the holder might recover against the antecedent parties, and evidence of the impossibility of presenting it at the time of the maturity of the bill might be given on the ordinary averment that it was duly presented. In this case, Lord Ellenborough observed, that "duly presented is presented according to the custom of merchants, which necessarily implies an exception in favor of those unavoidable accidents which must prevent the party from doing it within the regular time," and it was left to the jury to say whether from the situation of the country it was impossible for the plaintiff to present it in due time. *Patience v. Townley*, 2 Smith, 223. See also *Schofield v. Bayard*, 3 Wend. 488, per Savage, Ch. J. 491. And upon the same principle, any political event that interrupts the intercourse between different countries, or different parts of the same country; the stoppage of the mail by ice or snow or freshets; the detention of a vessel by contrary winds; the loss of the bill by robbery; (*Story on Bills*, 349, § 308;) is deemed a sufficient excuse; (*Chitty on Bills*, ed. 1833, p. 360, 389, 422, 423, 485, 524;) but the party is held to perform his duty within a reasonable time after the circumstances will permit. (*Chitty on Bills*, ed. 1833, p. 422, 423.) *Hopkirk v. Page*, cited *supra*. *Patience v. Townley*, id. In *Price v. Young*, 1 M'Cord, 339, it was held that the death of the holder of a bill or note before it became due did not excuse the want of a due presentment for payment and due notice of dishonor, though no administration was taken out at the time. But it is questioned by Mr. Justice Story, (*Story on Bills*, 350, n) whether this decision be consistent with the general principles of law on this subject. See also *Chitty on Bills*, ed. 1833, p. 360, 422, 485, 524.

(b) If an agent or banker be a nominal holder, though only for the purpose of collection, he is entitled to the same time to give notice of the dishonor as if he were himself the real holder. In short he is treated as such. (*Story on Bills*, 323, § 292. *Chitty on Bills*, ed. 1833, p. 521, 522. *Bayley on Bills*, ed. 1830, p. 272, 273. 3 Kent's Comm. 108.) *Farmers, &c. Bank v. Turner*, 2 Litt. 18. *Colt v. Noble*, 5 Mass. R. 67. See *Van Wart v. Smith*, 1 Wend. 219. *Sewell v. Russell*, 3 Wend. 276, 277. *Howard v. Ives*, 1 Hill, 263. *Haynes v. Birks*, 3 Bos. & Pul. 599. *Scott v. Lifford*, 9 East, 347. *Langdale v. Trimmer*, 15 id. 291. *Church v. Barlow*, 9 Pick. 547, 549. *U. S. Bank v. Goddard*, 5 Mason, 366. *Mead v. Engs*, 5 Cowen, 303. But if information of the dishonor of a bill be sent to an agent not a party to it, to be communicated to the drawer, &c. he must give notice thereof immediately; and if he omits so to do till the next day the drawer is discharged. *Sewell v. Russell*, 3 Wend. 276. *United States v. Barker*, 12 Wheat. 559. S. C. 4

Lansing v. Fleet.

fore he could possibly have received it from the remitter of the bill, he cannot complain.

If the agent undertakes to give notice, it will be good, if it be given as early as it could have been received [*3] from the holder. It would be too rigorous to require more of an agent in such a case. If the agent does not use due diligence in sending information to the holder of the non-acceptance or non-payment, the latter may, perhaps, suffer for the negligence of his agent. The plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

LANSING *against* FLEET.

Where a defendant is taken in execution, and the sheriff suffers the prisoner voluntarily to escape, he cannot afterwards retake or detain him, without a new authority from the plaintiff.

All his legal control over the prisoner ceases by his own wrong, and no act of his, and no assent of the prisoner, with whom he must be deemed in collusion, can help him. Per *Kent, J.*

Nor will the voluntary return or assent of the prisoner, prevent his liability for the escape.

After a voluntary escape the sheriff cannot lawfully retake or detain a prisoner, though he may after a negligent escape.

But so far as the plaintiff is concerned, he shall never suffer for the sheriff's default, and there is, therefore, no difference whether the escape is *voluntary* or *tortious*, and he has the same remedies in the former as in the latter case. The law gives him the election to charge the sheriff, or pursue the defendant with fresh process; and if the defendant has voluntarily put himself in prison again, instead of fresh process, which would be useless, he may detain him, by affirming him to be again in execution. Per *Kent, J.* and *Benson, J.*

The common law in relation to voluntary escapes before the stat. 8 and 9 Wm. III. ch. 27, and the effect of that statute considered by *Radcliff, J.* and *Kent, J.*

THIS was an action of debt, brought by the plaintiff, as late sheriff of the city and county of New York, against the

Wash. C. C. R. 464. See also *Talbot v. Clark*, 8 Pick. 51. *Mead v. Engs*, cited above.

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defendant, one of his deputies, on his bond of indemnity, for an escape. The cause was tried at the July circuit, in 1799, before Mr. Justice *Benson*.

At the trial, the following facts appeared in evidence. On the 8th May, 1798, a *ca. sa.* issued on a judgment in this court, in favor of William Journey against John B. Hicks which was delivered to Merritt, one of the deputies of the plaintiff, who, on the same day, arrested Hicks, and voluntarily suffered him to go at large, after he had been in his custody about an hour, and Hicks continued at large until ten o'clock in the morning of the 10th May, when Merritt retook him on the same execution, but Hicks was afterwards seen at large on the evening of the same day. The defendant afterwards arrested Hicks on the same execution, and he escaped by running away from the defendant, but not while on the way to prison. The plaintiff paid the amount of the execution to Journey.

Merritt was offered as a witness on the part of the plaintiff, but he was objected to by the defendant's counsel. The judge, however, overruled the objection; and the witness testified, that he was in a room with Hicks on the 8th May, *and had the execution, but he did not consider [*4] Hicks as in his custody on that day, and suffered him to remain at large; that on the 10th May, he arrested Hicks, and by his request, delivered him, with the execution, to the defendant, who consented to receive him; that the defendant told the witness that he went with Hicks to several places, which consumed considerable time, when Hicks made his escape, and the witness afterwards saw him at large.(a)

(a) An escape, (*escapium*, from the French *eschapper*, *id est*, *effugere*, to fly from,) signifies a violent or privy evasion out of some lawful restraint, as where a person is arrested or imprisoned, and gets away before delivery by due course of law. Staundf. P. C. cap. 26, 27. Jac. L. Dic. tit. Escape. In *Colby v. Sampson*, 5 Mass. R. 311, Parsons, C. J. observed, that "every liberty given to a prisoner not authorized by law is an escape;" and this agrees with the doctrine of De Grey, C. J. in *Hawkins v. Plomer*, 2 Wm. Black. 1048, "that if the defendant when taken in execution is seen at large for ever so short a time, as well before as after the return of the writ, it is an escape in the sheriff; it is his duty to obey the writ, and the writ commands

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A verdict was taken for the plaintiff, subject to the opinion of the court on the above case.

him to take the defendant and him safely keep so that he may have him ready to satisfy the plaintiff." See also *Lowry v. Barney*, 2 Chip. 11. *Benton v. Sutton*, 1 B. & P. 24. The prisoner must, therefore, be kept in *salva et arcta custodia*. *De Grand v. Hunnewell*, 11 Mass. R. 160. See *Clapp v. Cofran*, 7 id. 98, 101; 10 id. 373. Also, *Clapp v. Hayward*, 15 id. 276. *Reed v. Fullum*, 2 Pick. 158. *Steere v. Field*, 2 Mason's C. C. R. 486. Thus where A., a sheriff's officer, went with B. to the house of C. to arrest him upon a *ca. sa.*; A. read the warrant to C., whereupon C. rushed out against A. who caught C. around the waist, but was unable to hold him, and he in consequence escaped. *Nicholl v. Darley*, 2 Young & Jervis, 399. See also *Griffin v. Brown*, 2 Pick. 304. So where the officer under the warrant upon a *ca. sa.* not having any clause of *non omittas* in it, entered a franchise and arrested the defendant and suffered him to go at large without removing him. *Piggott v. Wilkes*, 3 B. & A. 502. So where a sheriff's officer having taken a prisoner in execution, permitted him to go about with a follower of his before he took him to prison. *Benton v. Sutton*, 1 Bos. & Pul. 24; and where a deputy sheriff arrested a defendant on an execution, and left him in the custody of two brothers of the defendant, and went to serve other process, and did not take him to jail until the next day, *Palmer v. Hatch*, 9 Johns. R. 329, the persons in whose custody the prisoner was left in both these cases having no authority to detain him in the absence of the officer. So where a prisoner in execution for debt, having given bond for the liberty of the yard, went in the night time into a room upon the ground floor of a house owned by the county within the limits of the yard and kept by the jailer, but the chambers of which above the rooms on the ground floor had only been used by debtors having the liberty of the yard. *Freeman v. Davis et al.* 7 Mass. R. 200. So where the sessions had assigned certain apartments in the jailer's house, which was within the limits of the jail yard, as the chambers and lodging of debtors having the liberty of the yard, under the Massachusetts statute of 1784, ch. 41, and such a debtor had passed his evenings in another chamber of the same house, with the permission of the sheriff and jailer, though he had always slept in one of the rooms assigned by the sessions. *Burroughs v. Louder et al.* 8 id. 373. See also *Bartlett v. Willis*, 3 id. 86. So where the prisoner went beyond the liberties knowingly, on pretence of avoiding a snow bank which obstructed his usual walk, even although the liberties were vaguely defined without the "posts or other visible marks" prescribed by the New York statute, *Bissell v. Kip*, 5 Johns. R. 89, it was held an escape. So if a sheriff be committed to his own jail, *Day v. Brett*, 6 Johns. R. 22; or a jailer be so committed, unless a new keeper be appointed, *Steere v. Field*, 2 Mason's C. C. R. 486; or a prisoner for debt be made a turnkey, and intrusted with the keys of the outer as well as the inner doors, at all times by day and night, id.; or if a defendant who had been arrested on an execution, be removed out of the county in which he was arrested, *McGruder v. Russell*, 2 Blackf. 18;

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The cause was argued, at the last term, by *Riggs*, for the plaintiff, and *C. I. Bogert*, for the defendant.

or if a prisoner be admitted to the liberties of the jail except in cases provided by statute, *Leonard v. Hoyt*, Brayt. 73, and see *Whitehead v. Varnum*, 14 Pick. 523; or if, (in Connecticut,) a prisoner who hath taken the poor debtors' oath, depart without remaining a reasonable time after the money left for his support is expended, *Fitch v. Cooke*, 1 Root, 285; *Wells v. Lindsley*, 2 id. 481; *Carrington v. Parsons*, 4 Day, 45; or if the defendant be permitted to go at large by the sheriff, by the consent and direction of the plaintiff's attorney, acting merely under his general authority, *Kellogg v. Gilbert*, 10 Johns. R. 220; or by a constable under an order of a justice, who has no authority from the plaintiff to make such order, *Van Slyck v. Taylor*, 9 Johns. R. 146; and see *Randall v. Bridge*, 2 Mass. R. 549; and *White v. Jones, Marshal*, 5 East, 292; 2 Smith, 77; 5 Esp. 160; or if a prisoner, taken by the bailiff of a liberty who has the return and execution of writs, be removed to the county jail situate out of the liberty, and delivered there into the custody of the sheriff, *Boothman v. Earl of Surrey*, 2 T. R. 5; or if a prisoner be liberated by the sheriff after the receipt of the money due from him, and before it has been paid over in satisfaction to the party entitled to it, *Slackford v. Austin*, 14 East, 468; see also *Wooden v. Moxon*, 6 Taunt. 490; 2 Marsh. 186; it will be an escape.

So it was adjudged an escape that the county had no public jail, and therefore the sheriff was not excused, for "he has not any discretionary power to confine his prisoners any where else in case of the insufficiency of the jail," but he must seek a remedy against the county. *Richardson v. Spencer*, 6 Ohio R. 13. *Commissioners of Brown v. Butt*, 2 id. 351. *Campbell v. Hampson*, 1 id. 119. *Gwinn v. Hubbard*, 3 Blackf. 14. And also where a judgment debtor, after enlisting in the army of the United States, was committed to prison in execution, and having obtained the liberty of the yard by giving bond according to the statute, was forcibly carried without the limits of the prison by a party of soldiers, he was holden to have committed an escape within the condition of the bond. *Cargill v. Taylor et al*. 10 Mass. R. 206. In this case, Sewall, J. observes:—"A rescue, before commitment, of one arrested upon meane process, subjects the rescuers, and not the sheriff or officer who made the arrest, to an action for the benefit of the party injured. But after commitment, the sheriff or jailer is liable. And a rescue before commitment, is no excuse for the officer, where the arrest is by virtue of a writ of execution. Cro. Jac. 419. *Crompton v. Ward*, 1 Strange, 429. 4 Co. 84. *Dyer*, 66, 67, 244. Cro. Eliz. 815. In short, after commitment in a civil suit, every discharge of the prisoner, without the consent of the plaintiff or creditor, or in due course of law, is an escape; for which the sheriff or jailer is liable, with the exceptions only, which are recognized as cases of necessity. Such for instance, is the case of a prisoner who leaves the jail when in danger from a sudden fire within the jail, or when the jail is broken by a public enemy; but a breach of prison by traitors is no excuse for the jailer.

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RADCLIFF, J. The fact that Hicks consented to the second arrest, on the 10th May, does not, I think, solely de-

1 Rol. 808, l. 7, 5. Bro. Escape, 10." See also *Patten v. Halstead*, Coxe, 277. *Alsept v. Eyles*, 2 H. Black. 108; and the authorities cited by Lord Loughborough, p. 112, 113, and *Elliott v. The Duke of Norfolk*, 4 T. R. 789.

But it is no escape if one be delivered by due course of law, as an act of the legislature, *Fitch v. Badger*, 1 Root, 72; or be released from necessity, as if a debtor having the liberty of the yard be suddenly seized with illness in the highway and carried to a private house, "for it happened by the providence of God, which shall hurt no man." If, however, the person had voluntarily left the street and entered the house, the case would have been different, *Baxter v. Taber*, 4 Mass. R. 361, 369, 370; and so it would if he had been forcibly rescued by individuals, other than the public enemies, and this constitutes the distinction between *Cargill v. Taylor*, cited *supra*, and the case just mentioned. In *Benton v. Sutton*, 1 Bos. & Pul. 24, cited *supra*, it was questioned whether a laudable and compassionate indulgence by accompanying the prisoner to his house, for the purpose of enabling him to examine his books and settle the means of discharging his debt, would be an escape. It was not doubted that the effect of process of execution is to operate immediately by the duress of imprisonment, and that any length of indulgence under color of the prisoner being always in the presence of the officer, as if the latter wore the livery of the former and rode with him to a horse race, would be contrary to the exigency of the writ; but the court expressed no opinion upon the question whether a humane purpose might not modify the hardship of the general rule. But in *Wool v. Turner*, 10 Johns. R. 420, this question was distinctly presented to the consideration of the court. After the arrest, the sheriff went with the defendant to a tavern, two miles out of the direct route to jail, in order that the latter might obtain the means of settling the execution, and also a mile further to his house, in order that he might get his necessary apparel and see his wife. This the court held not to be an escape, because "the officer was only to take the prisoner to jail with all convenient and reasonable diligence, and he was not to relax but for some laudable and compassionate purpose," such as that presented to their consideration.

It is no escape if a sheriff carry a prisoner taken in execution to a lock-up house within his own bailiwick, and keep him there fourteen days, *Houlditch v. Birch*, 4 Taunt. 608; or if a prisoner be allowed the liberty of all the apartments within the jail walls, for confinement within the walls is *salva et arcta custodia*, *Steere v. Field*, 2 Mason, 486, cited *supra*; or if a prisoner visit the jail yard in the night time upon calls of nature, when there are no accommodations within the jail, *Patridge v. Emmerson*, 9 Mass. R. 122; but see *McClellan v. Dalton*, 10 id. 190; (see also the Mass. Stat. of 1784, ch. 41, in reference to which these cases were decided,) or pass the night in a house appropriated by the county to the use of the prisoners, though the jailer exercise no control over the house or the prisoner, *Jacobs v. Tolman*, 8 id.

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pend on the express testimony of Merritt. The circumstance that on that day he was in the actual custody of Merritt, and

161; or render himself at a place beyond the limits, for the purpose of taking the poor debtors' oath, *Commonwealth v. Alden*, 14 id. 388; or be committed to the custody of a jailer who is himself a prisoner. *Steere v. Field*, cited above. Nor is it an escape if the court had no authority to render the judgment by virtue of which the prisoner is held, *Austin v. Fitch*, 1 Root, 288; nor if the person arrested be privileged from arrest, *Greene v. Edson*, 2 New Hamp. R. 293; nor seized upon a void execution, *Hutchings v. Edson*, 1 id. 139; *Jones v. Cook*, 1 Cowen, 309; *aliter* if it be voidable only, id; nor if (in Pennsylvania) he do not go beyond the liberty of the jail yard. *Green v. Hern*, 2 Penn. R. 267.

It has been discussed what kind of indulgence to a prisoner in the sheriff's custody on a *ca. ss*, and who is directed to be brought before the court to testify under a *habeas corpus*, will subject the sheriff to an action for an escape. This was considered by Spencer, Ch. J. in *Hassam v. Griffin*, 18 Johns. R. 48, who remarks:

"The earliest case upon this subject is Boyton's. 3 Coke's Rep. 43. It was resolved by the court, that there was a difference between the custody of one in execution, within the county where the common jail is, and where the sheriff hath the custody of one in execution out of the county; and it was adjudged, that where the sheriff hath one in execution for a debt, and a *habeas corpus* issues to have the body in the King's Bench, at a certain day; by force of which writ, the sheriff, before the return of the writ brings his body to an inn in Smithfield, towards Westminster, and the prisoner, of his own head, goes without any keeper, to Southwark, and the next morning comes again to the sheriff, to Smithfield, and at the return of the *habeas corpus*, the sheriff delivers his body in court, this was no escape; and they referred to *Charnock's case*, 31 Eliz., and observed, that it stood with great reason; for the sheriff may more strongly guard his jail, than every inn or other place through which he travels. Bacon, title Escape, B., mentions this case as law. In the case of *Moredell v. The Marshal of the King's Bench*, 1 Mod. 116, which was debt for the escape of one Reynolds, the defendant gave in evidence a *habeas corpus ad testificandum*, and it appeared that the prisoner went down too long beforehand, and staid too long after the assizes were done at Wells, and that he went back three-score miles beyond Wells, before he returned again to London. Hale, Ch. J. said, that if a *habeas corpus* be granted to bring a person into court, and the sheriff lets him go into the country, it is an escape; that he ought not to carry him a roundabout way, for the accommodation of the party; and that if he did, it was an escape; that, by the evidence, the sheriff let him go back three-score miles, to which there could be no answer.

"In Trinity Term, 12 Ch. I. (Cro. Car. 466,) at a meeting of the justices and barons of the exchequer, Brampton, Ch. J. published, that the prisoners of the King's Bench and Fleet had petitioned the king, for avoiding the plague, that

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also of the defendant, without any resistance on the ground of their want of authority to hold him, is alone presumptive evidence that he had submitted to that arrest. As there is nothing to countervail this presumption, the objection against the competency of Merritt as a witness, appears to me unimportant and unnecessary to be considered.

The principal question is, whether, after the voluntary escape suffered by Merritt, and the subsequent arrest of Hicks, consented to by him, it was lawful to detain him as a prisoner? If it was lawful, then it was the *duty* of the defen-

they who could give sufficient security to be true prisoners, and to return at the days prescribed, might go at large on *habeas corpus* for that time. All the justices and barons present having consulted, resolved that a *habeas corpus* was a good and legal writ, but under color thereof, the wardens and marshal ought not to suffer prisoners to go at large; that it was an abuse of the writ, and an escape. In *Holdroid v. Liddel*, 1 L. Ray. 241, Powell, J. said, if a *habeas corpus* is delivered to a sheriff, in July, to bring a man in execution to the common pleas next Michaelmas term, the sheriff may take a reasonable time, of which the court would judge; but he cannot bring him out of prison, and keep him out all the vacation; but Treby, Ch. J. said he would not determine that point.

"Dalton, (Sheriff, 141.) lays down the law to be, that on a *habeas corpus*, if the prisoner, of his own head, goeth at large, and afterwards return to the sheriff, it has been adjudged not to be an escape.

"It appears to me to be well settled, and I have met with no decision to the contrary, that if a sheriff, in yielding obedience to a *habeas corpus*, necessarily takes the prisoner out of his county, and returns with him when the exigency of the writ is answered, without unnecessary delay, that he is not guilty of an escape, if the prisoner of his own head should stroll about, and sometimes be out of the sheriff's view. Indeed, I am by no means satisfied, that if the sheriff should permit him to go out of his sight, whilst he has him under the *habeas corpus*, provided always there was no unreasonable delay in returning him to prison, that even such an indulgence would be an escape. The *habeas corpus* relieves the prisoner, temporarily, from the duress of imprisonment under the execution. He is not there enduring the restraint created by the execution, with a view of coercing payment."

An escape is either with the consent of the officer, as in the principal case, when it is termed voluntary or permissive, or it is without such consent, when it is termed negligent, violent or tortious. 2 Steph. N.P. 1212. Jac. L. Dict. tit. Escape. Grah. Prac. 2d ed. 148, 414. This distinction, frequently of the greatest importance, has been fully treated in many of the adjudged cases, but it is beyond the design of this note, which is limited to a statement of the general rule as to what constitutes an escape, and a few of those illustrations that are to be found profusely scattered through the books.

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dant to detain him, and he would be liable to the sheriff for the second escape. If it was not lawful, the second arrest must be deemed a nullity, and the defendant in that case would not be liable.

It ought to be observed that this is a question between the sheriff and his deputy only, by which the interest of the plaintiff, in the original suit, cannot be affected. The general rules on the subject of escapes, so far as they respect the right of recaption by the plaintiff and the sheriff, appear to be well settled.

* 1. In case of a negligent escape, both the plaintiff [*5] and the sheriff have a right to retake the prisoner, but the plaintiff may elect to proceed against the sheriff, who will be liable to him, unless by fresh pursuit he retakes the prisoner, before action brought.

2. In case of a voluntary escape, the plaintiff may also retake the prisoner, but the sheriff cannot; and the prisoner may resist any attempt by him for that purpose. (1 Roll. Abr. 901, 902; 1 Lev. 211; 1 Sid. 330; 1 Show. 174; 2 Jon. 21; 2 Mod. 136.)

3. If the sheriff let the prisoner go by the consent of the plaintiff, neither he nor the plaintiff can retake him.

Neither of these positions extend to the case of a voluntary escape, and a subsequent voluntary return or submission of the prisoner. The right of the plaintiff, however, is undoubted, that he may elect his remedy, either against the prisoner or the sheriff, notwithstanding the free return of the former, and his submission to the arrest, for *as between the plaintiff and the sheriff*, nothing can purge a voluntary escape. The sheriff, in all events, continues liable to him, unless he choose to relinquish his responsibility and pursue his remedy against the prisoner. It is in this sense, and in relation to the sheriff only, that the authorities are to be understood, when they say that a voluntary escape *cannot be purged*.

It is also proper to remark, that neither the present question, nor any of the rules that have been mentioned, depend on the statute of 8 & 9 Wm. III. which has been adopted here, and was cited on the argument. The *plaintiff*, before that

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statute, in all cases of *negligent* or *voluntary* escapes, had a right to *retake* the prisoner, and the statute thus far is in affirmance only of the common law. It enacts that if the prisoner escape, by any ways or means howsoever, the creditor may retake him by any new writ, or sue forth any *other execution*. The only material alteration made by the statute is, that the creditor may also have a remedy, *by any other species of execution*.

It appears to me essential to the *rights of the plaintiff*, that the sheriff should be permitted to hold a prisoner who voluntarily returns and submits to a legal process, although after a voluntary escape. He cannot hold him with a [*6] view *to his own indemnity*, because, by being accessory to the escape, he violated the duty of his office; and forfeited all right to the aid of the law. He is thereby made liable to the plaintiff for the whole amount of his demand, and, with respect to him, may be completely *substituted*, in point of responsibility, for the prisoner. But he is the substitute, only *at the election of the plaintiff*. The latter is not bound to look to the sheriff. He may *continue* his remedy against the prisoner, and retake him *by new process*, or, if already in jail, suffer him to remain, and *admit him in execution* on the former process. If the prisoner be already in jail, on a voluntary return, and nothing be done to determine the plaintiff's election to substitute the sheriff, it follows, *of course*, that the prisoner is again *in execution* at the suit of the plaintiff. No act of the plaintiff is necessary to that end. The parties are restored to their former situation, unless the plaintiff elect to proceed against the sheriff; and until that be done, it must be lawful in the sheriff to detain the prisoner.

This appears to be a natural and equitable course in relation to all concerned. It gives to the plaintiff a complete redress, against both the sheriff and the defendant, and effectually places the remedy against *both* in *his power*. It may be very important to his rights that the prisoner should thus be deemed to be in execution, for he may have good reasons to elect to pursue his remedy against him; but if

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the sheriff has not the power to hold him, this remedy must again be defeated, unless the plaintiff be able to retake him by *new process*. In fact, it would lead to the position, that the plaintiff can, in such case, have no remedy *against the prisoner* but by a new writ, which is not warranted by the cases on the subject. As it respects the defendant himself, no injury is done. His imprisonment is the consequence of his own act, by which he ought to be concluded ; and there is no reason why the law should interpose to exempt him from it. He is no more an object of favor, or entitled to relief, than the sheriff is entitled to the aid of the law to compel his return. With regard to the sheriff, the responsibility he incurs is a sufficient restraint. Beyond this the "rigor of the law ought not to extend. Neither [*7] policy nor justice demands it. It would place him in a worse condition than the prisoner himself, for whose responsibility alone he is bound to answer. I therefore think, that the detention of a prisoner, under such circumstances, ought to be deemed *lawful*, for the *benefit of the plaintiff*, and in *furtherance of his remedy*. If lawful, it was the *duty* of the sheriff, and, of course, of his deputy, in this instance, to detain him. As between the sheriff and his deputy, it was also *material*, for by suffering him again to escape, the sheriff was deprived of the benefit of the plaintiff's election to hold the prisoner in execution, so far as his continuing in custody, afforded the opportunity and the means of making it.

The authorities on the subject, I believe, will be found not only to support the sheriff's right thus to detain a prisoner, but to impose it on him as a *duty*, and if he neglect to do it, make him liable *as for a second escape*. I admit there is one case, that of the sheriff of Essex, decided and reported by Ch. J. Hobart, (Hob. 202; 15 Jac. 1;) which is opposed to this doctrine. It was there ruled, that by a voluntary escape the execution was so utterly discharged, that if the prisoner, afterwards, voluntarily returned and continued in jail till the time of a new sheriff, and was then again suffered to escape, the new sheriff was not liable, even though

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the plaintiff allowed the prisoner so to return and submit to the execution. But this case has been repeatedly overruled, or denied to be law. (1 Roll. Abr. 901, 902. (B.) 10 Car. 1; 11 Vin. 26, pl. 8, S. C. In Viner it is if *he return*.) 1st. By a case in Roll. Abr. where it was resolved that if A. be in execution at the suit of B. and escape with the consent of the sheriff, and afterwards *he return*, or the sheriff *retake* him, and keep him in prison, he shall *again be in execution* to B. for although B. may bring an action against the sheriff for this voluntary escape, yet this is at his election, and it may be that the sheriff is incompetent to make a recompense. 2d. By Ch. J. Hale, in *James v. Pierce*. (2 Lev. 132; 27 Car. II.) In that case there was a voluntary escape from the warden of the Fleet, and a voluntary return of the prisoner. A new warden was appointed and a second escape permitted. It was resolved that an action [*8] lay against *the new warden*; and it is there held that the plaintiff might, at his election, *take the prisoner to be in execution*, and charge the new warden for the last escape or *admit him to be out of execution*, and charge the old warden. 3d. By the case of *Lenthal v. Lenthal*, (2 Lev. 109; 26 Car. II.) where there was a voluntary escape from the marshal, and a voluntary return. The marshal died, and the office descended to his son, who again suffered a voluntary escape, and it was resolved by the whole court, after considering the cases above cited from Hob. and Roll. that the action well lay against the son, for a second escape.

Again, in the case of *Grant v. Southers*. (6 Mod. 183; 3 Anne.) Grant had been in custody of the former marshal, who voluntarily suffered him to escape. Grant, afterwards, came voluntarily and returned, and being found in custody by the succeeding marshal, was detained by him; upon which Grant brought an action of false imprisonment against the new marshal. The court granted an imparlance till the next term, but at the same time, affirmed that *it was lawful to detain him*, and that to suffer him to go at large would be *an escape* in the second marshal.

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It appears that Comyns, whose name adds a sanction to these authorities, had the same view of the law on this subject. In his Digest, (3 Com. Dig. 647, E.) he says, "if a person escapes, and afterwards *returns* to the prison, the plaintiff *may admit him in execution*, although he has a remedy against the sheriff." And again, (ibid.) "so though the escape was *voluntary* by the jailer and without the plaintiff's consent."

From the tenor of these cases, it appears that the prisoner is considered to be again, *of course*, in execution, at the suit of the plaintiff, unless the latter evinces his intention to abandon that remedy, by proceeding against the sheriff for the escape. It is certain that it is not necessary for him to take out a *new writ* against the prisoner, but may *admit him to be in execution* on the former process. This is the express language of several of the cases. The plaintiff may, both by common law and the statute, take out such writ; but it would be absurd to compel him to do it when his *case* does not require it. Generally, however, a [9*] new process might be *necessary*; for the sheriff has no right to *retake* the debtor without it, and his voluntary return is seldom to be expected.

The circumstance that in most of the cases which have been mentioned, the question as to the legality of the prisoner's *detention* has arisen on a second escape suffered by a *subsequent* sheriff, is, in my opinion, immaterial to its merits. The case from Rolle is, however, not of that description. It was there decided in relation to the *same* sheriff. But it cannot be important. If the imprisonment was originally unlawful, it cannot be made lawful by the change of keepers. The rights of the plaintiff, or the power of the sheriff, or the personal liberty of the defendant, cannot depend on a circumstance like this. It must be obvious, too, that the question can seldom arise, except where there is a change of the sheriff; for with respect to the *same* sheriff a *second* escape cannot be material when he is equally liable for the *first*.

There is, I believe, no subsequent case which contradicts

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this doctrine, unless that of *Ravenscroft v. Eyles*, (2 Wils. 294,) be so considered. That was a voluntary escape on *mesne process*, and a voluntary return by the prisoner. The plaintiff proceeded to judgment, but not to *execution*, and then sued the warden for the *previous* escape. The question submitted to the court, was *whether the plaintiff, HAVING PROCEEDED TO JUDGMENT, could maintain his action?* The court determined that he could, and in reasoning on the subject, they say, that it being a voluntary escape, the jailer could not afterwards retake and detain him for the same matter; that the plaintiff might retake him by an *escape warrant*, but had his option to proceed as he pleased, either to judgment and *execution* against him, or against the warden; and yet they add that the prisoner was no longer in jail at the plaintiff's suit; and although the plaintiff might lawfully proceed to judgment, he could not charge him in execution. This case appears to me [*10] obscure and contradictory, unless *the court intended to be understood that the plaintiff, in order to charge him in execution, was obliged *first to retake him*, (although already in jail,) *by an escape warrant*. If so, the remedy by an escape warrant being founded on the statute of Anne, (1 Anne, c. 6,) which is not adopted here, can have no application to the present case. The case of *Key and Briggs*, (Skinn. 282,) there cited to be in point, does not support that position; and, besides, this mode of redress by the plaintiff, questionable as it may be, was not connected with the matter submitted to the consideration of the court. It was sufficient for the purpose of that decision to declare that after a voluntary escape on *mesne process*, the plaintiff, *although he proceeded to judgment*, might still maintain his action against the warden. I think, therefore, this case does not bear with any weight on the present question.

On the whole, I am of opinion, both on principle and the authorities on the subject, that the second arrest being submitted to by Hicks, was *lawful*, and, of course, that his subsequent detention by the defendant was equally lawful; that the interest of the plaintiff was materially concerned in

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keeping Hicks in custody, and that it does not lie in the mouth of this defendant to excuse himself by the previous default of Merritt, whose delinquency cannot purge his own; and, of course, that his suffering the second escape was a breach of his bond of indemnity, and rendered him liable to this action.

KENT, J. The question is, whether, upon the facts stated in the case, the defendant is responsible to the plaintiff upon his bond.

By the common law, as understood before and during the reign of Elizabeth, a voluntary escape of a prisoner in execution, completely and forever discharged him from the debt, so that neither the plaintiff nor sheriff could retake him for the same demand. (Bro. tit. Escape, pl. 12 and 45. *Linacre and Rhodes case*, 2 Leon. 96. *Phillips and Stone's case*, 2 Leon. 118.) The law was afterwards changed, or understood differently, and there were repeated decisions *in the reign of Charles II. and of William and Mary, [*11] that after a voluntary escape, the party was entitled to new process against the debtor, and was not confined exclusively to his remedy against the sheriff, who might, perhaps, be unable to indemnify him. (2 Mod. 159. T. Jones, 21. 1 Sid. 330. 1 Lev. 211. 1 Vent. 269. 1 Show. 169. 1 Salk. 271.) The statute of 8 and 9 Wm. III. c. 27, gave the party the like remedy of further process against the debtor's person, as well as of process against his property, after a voluntary escape; and it was, therefore, in part, *declaratory* of the law, as antecedently received and established. But neither the decisions previous to the statute, nor the statute which pursued and sanctioned them, impaired the plaintiff's right of action against the sheriff, or gave the sheriff any authority to retake the prisoner upon the original process. The law in that respect continued the same as before, that, after a voluntary escape, the authority of the sheriff over the prisoner is gone, and he cannot retake or detain, without new authority from the plaintiff. (3 Co. 52, 56. Hob. 202. 2 Wils. 295. 5 Term Rep. 25. 1 Sid. 330. 1 Show. 169. 1 Vent. 369.) Some of the cases speak of a prisoner

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upon a voluntary return, after a voluntary escape, as again *in execution*; but it will appear, upon an examination of those cases, that they all terminate in this conclusion, that he is to be deemed so, *at the election of the plaintiff*, and for his benefit, and not at the election of the sheriff. It was said *arguendo*, in the case of *James v. Pierce*, (1 Vent. 269; 3 Keb. 453,) and seems to have been agreed to by the court, that although the plaintiff may elect, yet, until he makes his election, the prisoner cannot be said to be in execution; and Hale, in giving the opinion of the court, said, that if the prisoner should bring trespass against the jailer, for being detained after a voluntary escape, the jailer could not defend himself. The same doctrine was laid down in the case of *Ravenscroft v. Eyles*, (2 Wils. 294,) and Ch. J. Wilmot observed, that a prisoner, when voluntarily suffered by the jailer to escape, is instantly at large, and that the jailer cannot retake and detain him for the same matter, and that, [*12] "although he voluntarily returns, he is not a prisoner at the plaintiff's suit, even if he is locked up every night. All the improvements, since the reign of Elizabeth, upon the law of voluntary escapes, have been made for the exclusive benefit of the plaintiff; none of them have been intended to relieve the sheriff in any respect from the consequences of his tort.

The only case that looks like a qualification of the law, as I have stated it, is that of a voluntary escape and return, and continuance in prison until the succession of a new sheriff. In that instance it is decided, (2 Lev. 109, 132; 6 Mod. 182; *contra*, Hob. 202,) that the new sheriff is bound to detain the prisoner, and is liable for his escape, because the plaintiff has his election to consider him again in execution. If this be a legal distinction, the reason of it may be, that the prisoner comes regularly, and by color of law, to the custody of the new sheriff, which is sufficient to justify him to detain. The new sheriff is charged with the custody of all prisoners delivered over by his predecessor, or that are in jail, if his predecessor die in office; and the books accordingly say, (3 Co. 72, b. n. 3,) that no mischief arises to a new sheriff, if he keep all the prisoners well until he hath perfect notice of all

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the executions. The cases assign as one reason for the right of action against the new sheriff, that the plaintiff is never to be without a remedy; and if the old sheriff be dead, his right of action against him, being personal, is dead also; (Dyer, 322; 1 Roll, Abr. 921; T. Jones, 21;) or if the plaintiff had *affirmed* the prisoner in execution, during the time of the former sheriff, then all remedy against him would equally have ceased. In these instances, unless the successor was responsible for all the prisoners turned over to him, the plaintiff might be left remediless.

The conclusion which I draw from a review of the numerous cases upon this subject, and from which I have endeavored to extract the substance, results in these propositions:

*1st. That after voluntary escape, the *sheriff* who [*13] permitted the escape cannot retake or detain the prisoner without authority from the plaintiff. That all his legal control over the prisoner ceases by his own wrong, and no act of his, and no assent of the prisoner, with whom he must be deemed in collusion, can help him. The law will not help a sheriff to retake or detain a prisoner after a voluntary, although it may after a negligent escape. This rule is extremely sound in principle, and salutary in its tendency, to prevent any collusion between the sheriff and his prisoners, and to secure to the public the faithful and vigorous execution of process.

2dly. That the *plaintiff* shall never suffer for the sheriff's default. The law is active to help *him*, and accordingly gives him his election to charge the sheriff, or to pursue the defendant with fresh process; and if the defendant has voluntarily put himself in prison again, instead of fresh process, which would be useless, he may detain him, by affirming him to be again in execution. And, as all the authority of the sheriff over the prisoner, subsequent to a voluntary escape, must be derived from the act of the plaintiff, it follows, that until such fresh process is received, he cannot in the one case, retake, and, that until notice is given of the plaintiff's election to hold, he cannot, in the other case,

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detain the prisoner. There is no evidence of any such election in the case before the court. The sheriff must be considered as having paid the debt, by reason of the first escape, and he was not injured by the act of the present defendant, who had no lawful authority to detain the prisoner. Whether Hicks was, or was not, *voluntarily* in custody a second time, is, therefore, immaterial, and judgment ought to be rendered for the defendant.

BENSON, J. The plaintiff was sheriff, and the defendant and Merritt were his deputies. Merritt having Hicks in custody on *execution*, voluntarily suffered him to escape.

Hicks was, afterwards, *voluntarily* in the custody of [*14] the defendant, *and, as intended, on the execution, and he then escaped from the defendant. The plaintiff has since paid to the party the amount of the execution, and has thereupon brought the present suit against the defendant on his bond of *indemnity*, and a verdict has been taken for him, subject to the opinion of the court on the question, whether the defendant could *lawfully* have *detained* Hicks?

The law on this question is conceived to lie within a very narrow compass. "If A. be in execution at the suit of B. and escape with the consent of the sheriff, and afterwards the sheriff retakes him, and keeps him in prison, he shall be in execution to B. for although B. may bring an action against the sheriff for this voluntary escape, yet that is at his *election*, and the party in execution shall not by his *own wrong* put B. to his action against the sheriff, contrary to his will, and it may be that the sheriff is not able to give him recompense. So adjudged on an *audita querela* by A. against B. brought on this surmise." (Roll. 902, s. 8.) In the same case, as found in another book, it is said that A. "returned to the prison." (11 Vin. 326.)

"If the prisoner escape of *his own wrong*, the sheriff *may* take him, and keep his body under custody, till he hath *agreed* with him, or may have an action on the case for his tortious escape, and he *shall never have an audita querela* against the sheriff; but it is otherwise when he escapes with

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the consent of the jailer, for then he cannot *take* him again; and in such case he *shall*, for his discharge, have an *audita querela*." (3 Coke, 52.)

If the defendant will return and remain in prison, until a new sheriff is made, and be then turned over to the *new* sheriff, he shall be *so far* in *execution* as that if he should escape again, the plaintiff may have his *election*; either to *take* him to have been in execution, and charge the *new* sheriff for the *last* escape, or *admit* him have been *out* of execution, and charge the old sheriff; for, perhaps, the old sheriff may not be responsible, or may be dead; and because it would be mischievous if the new sheriff might excuse himself by saying, that the defendant was not a *prisoner*, and so he could not *detain* him; for sheriffs permit prisoners ^{*in} execution to go out on security, and when [*15] they are sued they plead a *retaking on fresh suit*, and so the prisoners go out and return, at their pleasure, and if the new sheriff may, notwithstanding he had the defendant actually in prison, excuse himself in this way, that the *old* sheriff permitted a *voluntary* escape, all the creditors of the prisoner who was put there in the time of the old sheriff would be *defrauded*; for it will be very easy for the new sheriff to prove a *voluntary* escape by the old sheriff, when it might not have been in the power of the creditor to have proved it to have been *voluntary*." (2 Lev. 139, 132.)

"Although the escape is *voluntary*, yet debt (on the judgment) will lie against the party who escapes, and a *scire facias* will also lie on it against him." (1 Vent. 259.)

"On an escape *against* the will of the sheriff, either the *plaintiff* or the *sheriff* may *retake*. On an escape *with* the *consent* of the sheriff, the plaintiff *only* hath *remedy* to *take*, and *not* the *sheriff*. (1 Show. 177.) The law in reference to the *point* or question in the present case, as collected from these authorities, appears to be,

1st. That as it relates to the *plaintiff*, there is no difference whether the escape is *voluntary* or *tortious*, and that he has the *same* remedies in the *former*, as in the *latter* case;

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either he may take out new process, *or*, if the defendant should be in custody without new process, he may then, as it would seem, by some *other* act, *affirm* him *still* to be in execution, *or* he may bring an action of debt on the judgment; *or* revive it by *scire facias*; *or* bring an action for the escape against the sheriff; and without being liable to an *audita querela*, in the mean time, before he shall have *elected* between these several remedies. But

2dly. That as it relates to the *sheriff*, there is a difference in the two cases; for that where the escape is *tortious* the sheriff has every requisite *remedy*; either he may retake the defendant, and *detain* him till he is *indemnified*; and also, being in the mean time liable to an *audita querela*; *or* he may elect not to retake him, but, to bring an action against him for the escape; on the *contrary*, where the [*16] escape *is voluntary* he has no remedy; he cannot, without new process by the plaintiff, *retake* the defendant, and even if the defendant should *voluntary* return into custody, yet he cannot, unless the plaintiff will *affirm* him to be in execution, *detain* him, and if he should so *detain* the defendant, an *audita querela* will lie against him.

3dly. If the defendant, however, shall be in *prison*, when a *new* sheriff shall happen to come into office, and be *turned over* to the *new* sheriff, that the *new* sheriff has then a *right* to detain him; and the *reason* with the law, for *implying* this *right* in the new sheriff, is for the sake of the correlative *duty* which would then be implied in him, to *detain* the defendant, in order thereby not only to give the plaintiff an additional *surety* in the *event* of a *second* escape, but also to prevent the *fraud* to which he would otherwise be exposed; so that it is intended for the advantage and safety of the *plaintiff*, and not for any emolument or other benefit to the *new* sheriff, and certainly not for any *remedy* to the *old* sheriff. Indeed, the law cannot, consistently with itself, interpose for the sheriff, when there has been a *voluntary* escape; for the escape being to be imputed to him as his own *fault*, it is fit he should be left to suffer the consequences of it. It remains to be noticed, that the defendant reserved a question as to the

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evidence of the *fact*, whether, when Hicks came into his custody, he came *voluntarily*; but if the law is, as has been stated, that the defendant, in whatever *manner*, he might have acquired the custody of Hicks, without *new* process by the party, could not *lawfully* have detained him, then the *fact* itself is immaterial, and, consequently, the consideration of the *evidence* of it may be omitted. I am therefore, of opinion, that there must be judgment for the defendant.

LEWIS, J. was of the same opinion.

LANSING, Ch. J. being related to the plaintiff, gave no opinion.

Judgment for the defendant.(a)

(a) In the case of *Littlefield v. Brown*, 1 Wend. 398, 402, Savage, Ch. J. observed, that "between a voluntary and a negligent escape, there is a striking difference as regards the rights of the sheriff. His liabilities to the plaintiff are the same in both cases. There is, however, a difference as to the remedy. In case of a negligent escape, if the prisoner return before suit brought, the escape is purged and he is of course a prisoner again at the suit of the plaintiff. But in case of a voluntary escape, although the prisoner return before suit brought, the escape is not *ipso facto* purged as in case of a negligent escape; but the plaintiff may prosecute for it. He may however affirm him in prison at his suit, but such affirmation will not be presumed. It requires some positive act; either new process, or notice that the prisoner is received again as a prisoner at the plaintiff's suit. The sheriff's rights, however, in relation to the prisoner, are very different. In case of a negligent escape, the sheriff may pursue and retake the prisoner; in case of a voluntary escape, he cannot without authority from the plaintiff: yet it seems, in case of a voluntary return of the prisoner, the sheriff may receive him into custody, but cannot detain him without the authority or assent of the plaintiff." And in the case of *Thompson v. Lockwood*, 15 Johns. R. 256, 259, Spencer, J. in reviewing the principal case, says, "it settles the point, that after a voluntary escape, the sheriff cannot lawfully retake or detain a prisoner, unless the plaintiff in the execution shall issue a new process; nor can he detain on the surrender of the prisoner himself, unless the plaintiff in the execution does some act showing his election to hold him on the old process." And it was accordingly held in the latter case, that if the sheriff after a voluntary escape arrest the defendant on the same execution, and take from him a bond for the jail liberties jointly and severally with another person, that such bond will be void for duress both as to the principal and surety. See *Wheeler v. Bailey*, 13 Johns. R. 366. See also Grah. Prac. 2d. ed. 418, and *Harvey v. Huggins*, 2 Bailey R. 252. *Atkinson v. Matteson et al.* 2 T. R. 172, 177, per Grose, J. *Atkinson v. Jamieson*, 5 id. 25. *Featherstonhaugh v. Atkinson*, Barn. 373. *Tilman v. Lansing*, 4 Johns. R. 45, 47.

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[*17] "THE EXECUTORS OF VAN RENSSELAER *against*
THE EXECUTORS OF PLATNER.

Where R. granted and demised land to P. and his heirs, executors and administrators, reserving an annual rent, which P. for himself, his heirs, executors and administrators, covenanted to pay on the 1st day of May in each year, it was held, that the executors of R. could not recover rent which accrued subsequent to the death of their testator; *aliter*, for rent due previous to the testator's death.

Where several counts or causes of action are stated, and any one of them is bad, and the damages entire, the court cannot discriminate or give judgment for the whole. So where the right of action accrues periodically, or depends on time, if the plaintiff's declaration embraces a period for which he cannot be entitled to recover, and the damages are entire, it is equally out of the power of the court to distinguish the good from the bad, or to give judgment for the whole. *Per Radcliff, J.* Unless the court have sufficient matter by which to intend that no damages were given for the period when the plaintiff had no right. *Per Kent, J.*

It seems that an action of covenant will lie against the executors of the lessee, on such a covenant, though the land had passed, by act of law, into other hands.

Where in an action of covenant, or in any action sounding in damages, the plaintiff claims more damages than on the face of his declaration appears to be due, it will not vitiate, especially after verdict for the amount of the damages being ascertained by the jury, it is to be presumed they were assessed according to the proof. *Per Radcliff, J.*

THIS was an action of *covenant*. By an indenture, made the 12th January, 1774, John Van Rensselaer granted and demised to Jacob Platner, his heirs and assigns, a farm in Claverack, in the county of Columbia, to have and to hold, &c. unto the said Jacob Platner, his heirs, executors, administrators and assigns, forever, yielding and paying, &c., and the grantee for himself, his heirs, executors and administrators, covenanted to pay the rent. Platner died in 1775, and Van Rensselaer on 22d February, 1783, having made his will on the 20th February, 1783. The present suit was by the executors of Van Rensselaer, to recover the rent due from the 1st May, 1774, to the 1st May, 1783.

A verdict having been found for the plaintiffs, *Spencer*, for the defendants, moved in arrest of judgment on two grounds.

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1st. Because no action lies against executors, for rent which accrued after the death of the testator, who was tenant in fee.

2d. That the executors of Van Rensselaer have recovered, *quasi* executors, for rent due subsequent to the death of the testator.

Emott, for the plaintiffs.

RADCLIFF, J. This is an action of covenant, for rent due to the testator of the plaintiffs, which accrued on an estate *in fee*, subsequent to the death of the defendants' testator. A motion has been made in arrest of judgment, on two grounds.

1st. That the plaintiffs have claimed and recovered rent, which accrued subsequent to the death of *their testator*.

2d. That the recovery is for rent which accrued subsequent to the death of the *defendants' testator*.

*As to the first, there is no doubt, that where, in an [*18] action of covenant, or in any action sounding in damages, the plaintiff claims more damages than on the face of his declaration appears to be due, it will not vitiate, especially after verdict, (2 Lev. 57; Poph. 209; Cro. Car. 569, 629, 490; 5 Com. tit. Pleader, c. 84, p. 376, &c.,) for the amount of the damages being ascertained by the jury, it is to be presumed they were assessed according to the proof.(a)

(a) But if a judgment be rendered for a larger sum than the damages laid in the plaintiff's declaration, it is error. *Cheveley v. Morris*, 2 Win Black. 1300. *Usher v. Dansey*, cited *infra*. *McIntyre v. Clark & Morris*, 7 Wend. 330. *Cortelyou v. Cortelyou*, 1 Penn. R. 318. *Daniel v. Park*, 2 Penn. R. 1004. *Lake v. Merrill*, 5 Halst. 288. *Herbert v. Hardenbergh*, id. 222. *Hawk v. Anderson*, 4 id. 319. *Edwards v. Weister*, 1 A. K. Marsh. 382, *Rowan v. Lee*, 3 J. J. Marsh. 97. *Tenant v. Gray*, 5 Munf. 494. *Dinsmore v. Austill*, Minor, 89. *Flournay v. Childress*, id. 93. *Harris v. Jaffray*, 3 Har. & J. 546. *Derich v. Jones*, 1 Stew. 18. *Hoit v. Maloney*, 2 N. Hamp. R. 322. *Robinet v. Morris*, Hardin, 93. *Grist v. Hodges*, 3 Dev. 203. But yet on application, the court will allow the plaintiff to enter a *remittitur* for the excess. *Pickwood v. Wright*, 1 H. Black. 643. *Hardy v. Cathcart*, Marsh. R. 180. *Usher v. Dansey*, 4 M. & Selw. 94; and the authorities cited by Lord Ellenborough. And see a full consideration of this question by Ewing, Ch. J. in *Herbert v. Hardenbergh*, cited *supra*. See also *Grah. Prac.* 2d ed. 824.

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It is then a subject of evidence, and of computation as to amount only, within the plaintiff's right of action, and properly within the province of a jury. But where several counts or causes of action are stated, and any one of them is bad, and the damages entire, the rule is settled, in civil cases, that the court cannot discriminate, or give judgment for the whole. (Doug. 703.) So where the right of action accrues *periodically*, or depends *on time*, if the plaintiff's declaration embraces a period for which he cannot be entitled to recover, and the damages are entire, it is equally out of the power of the court to distinguish the good from the bad, or to give judgment for the whole. (1 Ld. Raym. 329; 2 Ld. Raym. 1382; And. 246; Carth. 96.) The time, in such cases, is material, and constitutes a part of the cause of action, and therefore cannot be rejected as surplusage. In the present case the plaintiffs, as executors, have claimed one year's rent which fell due on an estate in fee, subsequent to the death of their testator. It not being a case of apportionment, they clearly cannot recover for any part of the year's rent. It is, however, demanded in the declaration, as a distinct and substantive cause of action, and the damages are entire. The objection, therefore, on the face of the record, I think is fatal to the plaintiffs' action; but if it can appear from the judge's notes on the trial, that the plaintiffs claimed and recovered for the previous rent only, according to the modern and more liberal practice of our courts, I am inclined to allow the verdict to be altered or amended, agreeable to the truth of the case.

2d. As to the second objection, the authorities are numerous and decisive, that this action will lie on an *express* covenant, against the lessee and his executors, &c., though the breach be committed while a *third* person is in possession, *and is recognized as tenant by the lessor [*19] (Cro. Jac. 522; Cro. Car. 188; 1 Sid. 402; Hob. 188; Salk. 309; 3 Mod. 26; 1 Wils. 4; 2 Burr. 1190, 1195, 1197; 1 H. Bl. 444; 4 Term Rep. 98; 1 Dall. 307.) The *lessee* continues liable, and also his *executors*, to the extent of their assets, on the ground of the *express* covenant, so

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long as a *privity* of contract remains. That privity exists in the present instance ; the covenant is express, and the same rule must be deemed to apply. I am, therefore, of opinion, if the verdict can be amended, that the defendants take nothing by their motion, otherwise, that the judgment be arrested.

KENT, J. Two questions were raised at the argument in support of the motion :

1st. That no action lies against the executors, for rent accrued subsequent to the death of their testator.

2d. If it did, that the executors of Van Rensselaer have recovered, *quasi* executors, rent accruing since their testator's death.

With respect to the first question, it appears to me, from an examination of the cases, to be a settled rule, that covenant will lie on a covenant in deed against a lessee, notwithstanding a third person be at the time the actual tenant, and the lessor has recognized him as such ; and against his executors, notwithstanding he may have assigned in his lifetime, and the rent accrues subsequent to his death. The reason given for the rule is this, that the privity of contract of the testator, is not determined by his death, and the executor shall be charged with all his contracts, so long as he has *assets*. (3 Mod. 326.) In another case, (Cro. Ja. 522,) it is said, that in covenants *en fait*, a covenantor and his executors are always chargeable, and that the executors are not chargeable by reason of the privity of contract, but by reason of the covenant. But though some cases may differ in assigning the reason of the rule, they all concur in the rule itself. There is no instance, however, that I have met with, of a case exactly like the present, where the covenant for rent was upon an estate *in fee*. They are all upon terms for years, and it seems, accordingly, to be severe to apply the rule to the present case ; for here the executors or the *personal estate receive no consideration for the [*20] payment of the rent, since, on the death of Platner, the estate must have descended to the heirs at law.

In answer to this objection, I observe, that the responsi-

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bility of the executors to pay rent, accruing subsequent to their testator's death, is not placed upon the ground that they have the fund in hand, but upon the ground of the express covenant of their testator, from which no act that he can do will discharge him, or discharge them, so long as they have *assets*. There is a strong case to this effect. (2 Burr. 1190, *Enys' Executor v. Donnisthorpe's Executors*.) It was a suit in covenant for rent, on a joint lease to the testator of the defendant, and a third person, and the testator died, even before the commencement of the term, so that the whole term, and the benefit of it, survived to the other lessee. It was a lease of fifty years, and the same objection was made that I have suggested. "It looks very odd," said Mr. Justice Denniston, (2 Burr. 1196,) "that when one of the lessees dies, and the interest survives to the longest liver of them, yet the other's representatives should be bound by the covenants, though no benefit remains to them."

However, on further consideration, the court were unanimously of opinion, that the plaintiff was entitled to recover for rent subsequent to the death of the defendant's testator, although the estate was, by act of law, cast into the hands of another. The recovery was founded upon the express covenant, and not upon a charge, resulting from the benefit of enjoying the land.

As to this suit, so far as it respects the right of the plaintiffs, two points arises for inquiry; whether they can recover, in an action of covenant, rent in arrear at their testator's death, and if so, then whether they can recover rent due subsequent to his death.

1st. It is said, that at common law, executors had no remedy for rent in arrear in the lifetime of their testator, because they could not represent their testator, as to any contracts relating to the freehold. (Co. Litt. 162, a.) This was [*21] "remedied by the statute of 32 H. VIII. c. 37, which gave them a remedy by distress, and by the action of debt. It ought to be observed, that both these remedies are founded on the privity of estate, and that when the books say, that executors had no remedy at common law, they must be understood to mean none resulting from that privity.

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I have no doubt, they were always entitled to a remedy on an express covenant for rent, for that was a personal contract, independent of the freehold, as much so, as if the testator had given a bond for the rent, payable by instalments.

We find cases in which executors have been allowed to bring an action of covenant, on a covenant contained in deed, although the same was connected and run with the freehold. (1 Vent. 175; 2 Keb. 831; 2 Bac. Abr. 539.) This was not a suit for rent, and yet, equally with the present suit, it came within the reason of the objection to suits at common law by executors for arrearages of rent, to wit, that they could not represent their testator as to any contracts relating to the freehold. I conclude, therefore, that where there is an express covenant for rent, the executor is not confined to the statute remedies by distress and debt, but may resort to a common law remedy on the covenant.(a)

2d. As to the second point, it is equally clear that the executor can only go for rent due and payable at his testator's death, where the rent, as in the present case, goes, on the testator's death, to his heirs. The rent here was payable yearly, on the 1st May in each year, and this not being a case of apportionment, in respect to time, it is certain that the executors have declared for one year's rent more than they were entitled to.(b) This claim being a substantial ground of action, and material to the damages, and the damages, by the verdict being entire, *the judgment [*22] must be arrested, unless we have sufficient matter by which we can intend that no damages were given for the claim of the last year's rent.(c) (1 Ld. Raym. 329, and 246;

(a) See 1 Saund. 241, b., note 5, 6.

(b) As to apportionment of rent, see Woodfall's Tenant's Law, 248, *et seq.* 10 Co. 128. 1 Salk. 65. 1 P. Wms. 392. 2 P. Wms. 176, 501. Laws of New York, 11th sess. c. 36, s. 27, (vol. 1, p. 144.)

(c) Courts are liberal in amending verdicts to conform to the intention of the jury. *Hay v. Ousterhout*, 3 Hamm. R. 384. *Boatright v. Meggs*, 4 Munf. R. 185. See *Royall v. Eppes*, 2 id. 479. *Holladay v. Littlepage*, id. 539. *Bank v. Condy*, 1 Hill's (S. Car.) R. 209. *Brown v. Hillegas*, 2 id. 447. *Little v. Larrabee*, 2 Greenl. R. 37. *Girard v. Stiles*, 4 Yeates, 1.

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Carth 96 ; Sh. 1094.) But no such matter is shown ; on the contrary, it appears by the judge's notes, that damages were given for the last year, and, of course, the judgment must be arrested.(a)

BENSON, J. and LEWIS, J. were of the same opinion.

LANSING, Ch. J. This is an action of covenant for the recovery of rent.

A motion has been made in arrest of judgment.

Because, it appears that the plaintiffs claim as executors, and have recovered rent accrued after the death of their testator.

The plaintiffs declare on an indenture, made between John Van Rensselaer and the defendants' testator, by which the former granted in fee to the latter, certain lands, reserving an annual rent, payable on the 1st day of May in every year. It contains a covenant, by which the grantee binds himself, his heirs, executors, administrators and assigns, to the payment of the rent.

The declaration states, that John Van Rensselaer, the plaintiffs' testator, died seised of the rent on the 20th day of February, 1783, and that the last year's rent became due on the first day of May, 1783.

The 18th sec. of the statute respecting rents, which re-enacted the 4th sec. of the 37th chapter of the statute of 32 H. VIII. does not touch this case ; that statute is intended

And in applying a verdict to a good count, if the judge will certify that the evidence applied solely to that count, or that all the evidence given would properly apply to that count, as well as to another which is bad. *Union Turnpike Co. v. Jenkins*, 1 Caines' R. 381. *Stafford v. Grein*, 1 Johns. R. 505. *Highland Turnpike Co. v. McKean*, 11 id. 98. *Cooper v. Bissell*, 15 id. 318. *Norris v. Dunham*, 9 Cowen, 151. *Sayre v. Jewett*, 12 Wend. 35. *Barnard v. Whiting*, 7 Mass. R. 359. *Barnes v. Hurd*, 11 id. 57. *Sullivan v. Hoker*, 15 id. 377. *Patten v. Gurney*, 17 id. 187. *Cornwall v. Gould*, 4 Pick. 446. *Clark v. Lambe*, 6 id. 512 ; 8 id. 415. *Jones v. Kennedy*, 11 id. 125. *Paul v. Harden*, 9 Serg. & Rawle, 23. *Perry v. Boileau*, 10 id. 211.

(a) Where matter is insensible or void, and not of the gist of the action, the court will intend that no damages were given for it. 1 Str. 1094, 245. Cro. Jac. 664, 665. 1 Ld. Raym. 146, 976. Willes, 443. 2 Saund. 171, s. note 1. 2 Johns. Rep. 283, 442.

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merely to enable the executors, in the cases mentioned in it to sustain an action of debt for the recovery of rent, which they were not competent to recover at common law.

*But this action is founded on an express covenant, [*23] and the executors of the testator only representing his personal interests, must necessarily deduce their right to recover from the testator personally, and cannot sustain their action on their privity of estate, which devolved on the heir or devisee of the testator.

It is, therefore, clear, that the executors cannot go for rent accrued after the testator's death ; but they may well sustain a suit for the rent accrued previous to the death of their testator.

The grant on which the rent is reserved, is dated the 12th day of January, 1774.

The first rent is payable, by the terms of the grant, on the first day of May, 1774, and the rent accruing thereafter, on the first day of May in every year.

The plaintiffs' testator is averred to have died on the 22d day of February, 1783.

The plaintiffs declare for nine years rent, and in the declaration is contained a particular specification of the several years for which the rent remained unpaid. The last year's rent claimed, is alleged to have become payable on the first day of May, 1783.

Introductory to this specification in the plaintiffs' declaration, is an averment, that from the first day of May, 1774, to the first day of May, 1783, inclusive, the rent remained unpaid ; thus excluding the first year's rent, payable on the first of those days, and including one year which did not become payable till after the plaintiffs' testator's death.

The inconsistency between the general averment, and the particular specification, might be considered as cured by the verdict, but the introduction of a claim to damages on a substantive cause of action, which cannot be sustained after a general verdict, it is laid down as settled, is good cause for arresting judgment.

It was suggested, in the course of the argument, that the

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court ought to infer, that the plaintiffs' recovery was limited to the right they proved on the trial.

[*24] *It appears, however, upon recurring to the notes of the judge who presided at the trial, that damages were given for ten years' rent. This intendment cannot, therefore, be admitted.

Upon the whole, I am of opinion, that the judgment in this case must be arrested.

Judgment arrested.(a)

(a) The executor or administrator of the lessor is the only person who can sue for a breach of covenant by the lessee in the lifetime of the lessor. *Fitz. N. B.* 145, D. ; but if the lessee break a covenant running with the land, as a covenant to pay rent, *Hurst v. Rodney*, 1 Wash. C. C. R. 375 ; see also *Sandwith v. De Silver*, Browne, 221. After the death of the lessor, the proper person to seek a remedy for the breach is he to whom the reversion is transmitted, viz. if it be the reversion of a freehold estate, the heir ; if of a term, the executor or administrator ; or where in either case the lessor has devised the reversion, the devisee ; for as the reversion is transmitted to him, it is fit that he have the benefit of the covenants made in respect thereof. *Comyn Land. and Ten.* 2d ed. 278. *Abney v. Brownlee*, 2 Bibb, 170. *Hatcher v. Gallo-way*, id. 180. *Williamson v. Richardson*, 6 Monroe, 695. *South v. Hoy*, 3 id. 94. *Moale v. Tyson*, 2 Har. & McHenry, 387. *Bachus v. McCoy*, 3 Hamm. R. 211. *Goodrich v. Thompson*, 4 Day's R. 215. And see *Hamilton v. Wilson*, 4 Johns. R. 72, and 15 id. 488, n. (a.) *Rice v. Spotswood*, 6 Monroe, 40. *Grist v. Hodges*, 3 Dev. 200. Therefore if one covenants, grants and agrees that another shall have and enjoy Blackacre for a certain time, and the other covenants to pay in consideration thereof to the testator, his heirs, executors and assigns, a sum annually, the executor cannot sue on this covenant for a breach after the death of the testator. *Drake v. Munday*, Cro. Car. 207. *Cotter v. Merrick*, Hardr. 95. *Bac. Abr.* tit. Executor, H. 3. *Dyer*, 362, a. And although the rent should be expressly reserved to the lessor, (tenant in fee,) his executors and assigns, without naming the heir, the executors cannot have it, being strangers to the reversion, and the heir may sue for arrears accruing after the ancestor's death. *Co. Litt.* 47, a. *Sack-neverell v. Frogatt*, 2 Saund. 367. *S. C.* 2 Lev. 13. If, therefore, a man being seized in fee of one acre of land, and possessed of another for a term of years, makes a lease rendering one entire rent, and dies ; whereby the reversion of one acre goes to the heir and of the other to the executor, the rent accruing after shall be apportioned between the heir and executor. *Williams on Ex-ecutors*, 584, and note g. *Gilbert on Rents*, 188. *Moodie v. Garnance*, 3 Bulst. 153. But where no reversion is left in the lessor, and the rent is reserved to his executors, administrators and assigns, it will go to them and not to the heir. 3 Cruise's Dig. 321, 2d ed. *Jennison v. Lord Lexington*, 1 P. Wms. 555. Upon the general principle that the executor has no interest in

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**THE DEVISEES OF VAN RENSSELAER *against* THE
EXECUTORS OF PLATNER.**

Where an estate in fee is granted, reserving annual rent, the *devisees* of the grantor cannot maintain covenant against the executors of the grantee or tenant in fee, for rent in arrear.

THE facts in the present case were similar to those in the preceding, except that the devisees claimed only from the 1st of May, 1783, or subsequent to the death of the devisor.

The motion in arrest of judgment was argued by *Spencer*, for the defendants, and *Emott*, for the plaintiffs.

LANSING, Ch. J. delivered the opinion of the court.

This is an action of covenant for rent.

The defendants have moved in arrest of judgment,

1. Because the plaintiffs cannot legally sustain this action as devisees; and

2dly. Because the defendants are not liable, the estate on which the rent is charged having passed to the heir.

Neither the statute of 31 Hen. VIII. c. 1, or 32 Hen. VIII. c. 37, re-enacted among the revised laws of this state, apply to this case. (L. N. Y. 11 sess. c. 7; 11 sess. c. 36, s. 13.) The former applying only, as to the persons against whom a remedy is provided to the executors, administrators, and assigns, of *lessees for lives or for years*; the latter, to rents accrued in the time of the *testator*, or *intestate*. It must, therefore, depend upon the express covenant of the parties, whether this action is sustainable.

*The covenant imports, that Jacob Platner, the defendants' testator, for himself, his *heirs, executors, administrators and assigns*, covenanted, &c. to and with John Van

the real estate of the deceased, see *Drinkwater v. Drinkwater*, 4 Mass. R. 354. *Henshaw v. Blood*, 1 id. 35. *Gibson v. Farley*, 16 id. 280. *Stearns v. Stearns*, 1 Pick. 157. *Hamilton v. Wilson*, cited above. *Dean v. Dean*, 3 Mass. R. 258. *Willard v. Nason*, 5 id. 240. *Hathaway v. Valentine*, 14 id. 500.

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Rensselaer, the plaintiff's testator, his *heirs, executors, administrators and assigns*, to pay the rent.

As long as both parties were in full life, this covenant bound the defendants' testator to pay. If he died, from the terms of the contract, the grantor might charge the heir or executor, at his election, on the personal contract of their ancestor or testator; but when both the contracting parties were dead, their representatives must either claim or be liable on *the privity of contract*, or on *the privity of estate* subsisting between them.

In the case of *Brett v. Cumberland*, (Cro. Jac. 521,) the distinction between the operation of covenants in deed and in law is clearly taken. It was an action of covenant, by an assignee of a reversion against the executor of a lessee for life, on a covenant for repairs. The court had resolved that the clause in the lease on which this question arose, was a covenant in *deed*, in contradistinction to a covenant *in law*. And the action was held to be maintainable on the statute 32 Hen. VIII. c. 34, "for that by the express words of the statute it runs along with the land, and notwithstanding the assignment, the covenantor and his executor are always chargeable; for the executors are not chargeable, by reason of the privity of contract, but by reason of the covenant itself; and by the express words of that statute such remedy as the lessor might have against the lessee or his executors, the assignee shall have against them, it being a covenant in deed which runs with the land; but it is otherwise of a covenant in law, which is only created by the law; or of rent which is *created by reason of the contract*, and is by reason of the profits of the land, wherein none is longer chargeable with them than the *privity of the estate continues with them*."

[*26] *From the words of our statute, as well as the preamble of the English statute, which have been re-enacted with some alterations, adapting it to the circumstances of this state, but which alterations do not change the objects to which it is applied, it appears that the remedy was only intended to be applied to estates, in legal contemplation, capable of being transmitted through the personal representa-

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tives.(a) This rent is a fee-farm rent, (Harg. Co. Litt. 145, b. n. 5,) or *rent-charge*; it is perpetual. The rent is real estate, and so, certainly, is the estate out of which it issues; the rent and the land granted are equally transmissible to the heirs of the person seised.

If the statute does not apply, then this is a case at common law, and stronger than that to which the statute intended to apply a remedy. In those instances certain reversions were vested in the heir of the grantor: here the reversion is only contingent. If the covenant descends with the land, it must equally descend with the rent issuing out of the land; and if so, the personal representatives cannot, after the death of the parties, and for rents accruing after the death of both, either maintain or be subject to an action.

On the privity of contract, the defendants cannot be liable to the plaintiffs, because they are not legally competent to represent the mere personal rights of their testator, arising from the contract.

They cannot otherwise represent him, than as the rights

(a) The statute 32 Henry VIII. ch. 34, (substantially re-enacted in New York; 1 Rev. Laws, 363, 364; 2 Rev. Stat. 2d ed. 739,) was passed to obviate the difficulty which had been experienced from the common law rule that the grantee of a reversion, being a stranger to the covenants and conditions contained in a lease made by the grantor, could not avail himself of them. 1 Smith's Leading Cas. 28, note to *Spencer's case*. *Thursby v. Plant*, 1 Saund. 238, 240, and Sergt. Williams' note. *Barker v. Danier*, 3 Mod. 338. *Thrale v. Cornwall*, 1 Wils. 165. *Isherwood v. Oldknow*, 3 M. & Selw. 382. This defect seems to have been most severely felt upon the dissolution of the monasteries, when the king and his grantees were the parties to take advantage of covenants in outstanding leases, Comyn Land. and Ten. 263; and the statute was in consequence passed. The effect of the statute is, it is said, to transfer to the grantee the *privity of contract*; or, more correctly, the rights which the lessor had against the lessee, by reason of the conditions and covenants running with the land, so that now the grantee of the reversion may take advantage of all such covenants, whether in law or in deed, although only the lessor and his heirs be named in the lease. *Id. Anon.*, Moore, 159. *Kitchen v. Buckley*, 1 Lev. 109. *Thursby v. Plant*, *ut supra*, *Earl of Portmore v. Bunn*, 1 Barn. & Cress. 694. It sufficiently appears, as stated by Lansing, Ch. J. in the principal case, by the preamble to this statute, that it only affects estates for life and years, and this point was decided in *Matures v. Westwood*, Cro. Eliz. 617. See also Co. Lit. 215, a.

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of the testator devolve upon them ; but those being merely taken as devisees, they are strictly confined to the real estate.

If they claim against the defendants' deducing their title by the devisee, they must claim on the principle that the common ligament, *the estate charged*, unites them in interest, as privies, with the defendants ; but it is not pretended that the executors hold the estate or have any interest in it, and on this ground the action is not attempted to be [*27] *sustained.(a) We are, therefore, of opinion, that the plaintiffs' claim is radically and incurably defective, and that the judgment ought to be arrested.

Judgment arrested.

CASE *against* SHEPHERD.

Where a justice, after a *certiorari* from this court was delivered to him, proceeded to try the issue of traverse on an indictment under the act to prevent forcible entries and detainers, and the defendant being found guilty, the writ of restitution was issued, and the defendant turned out of possession, it was held, that the proceedings of the justice, after the *certiorari*, were *ceram non judice*, and void, and that the justice was liable to an action of trespass.

Where an entry is followed by an *ouster*, the party can recover damages only for the mere trespass or entry ; but if he make a re-entry and lays his action with a *continuando*, he may then recover damages for the *meane profits* or subsequent acts, as well as for the trespass.

THIS was an action of trespass *quare clausum fregit*, for treading down the plaintiff's grass, and cutting and carrying away wheat, rye, oats, &c. from his close, &c. Plea not guilty. The cause was tried, at the Rensselaer Circuit, before Mr. Justice *Benson*.

The defendant was a justice of the peace ; and in July, 1797, the plaintiff was indicted before him under the act to prevent forcible entries and detainers. The plaintiff pleaded

(a) See 1 Saund. 241, n. 5. H. Dyer, 309, a. Co. Litt. 215, a. Cro. Eliz. 363. 3 Term, 393.

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to the indictment, but before trial of the traverse, he obtained a *certiorari* from this court to remove all the proceedings, which he delivered to the defendant, who, notwithstanding, proceeded to try the issue, on which the present plaintiff was found guilty. The defendant, thereupon, issued a warrant of restitution, in the usual form, to the sheriff of the county, by virtue of which the plaintiff was turned out, and one Bull put into possession of the premises.

The plaintiff offered to prove that, at the time Bull was put into possession, there were crops of wheat and rye, *growing on the premises, which were reaped by him [*28] and converted to his own use. The defendant objected to this testimony, but the objection was overruled by the judge, and the evidence admitted. The plaintiff proved that Bull reaped about 200 bushels of rye, and 400 bushels of wheat, and the jury, thereupon, found a verdict for the plaintiff for 265 dollars, damages.

A motion was made to set aside the verdict, and for a new trial.

Emott, for the plaintiff.

Woodworth, for the defendant.

Per Curiam. There can be no doubt that the delivery of the *certiorari* to the justice, superseded his powers, and rendered all subsequent proceedings before him *coram non jure*, and void.(a) (Cro. Car. 261; 1 Salk. 352.) The act

(a) It is clearly settled, that when a *certiorari* is received by the court below, it operates as a *superseedeas*, and all subsequent proceedings on the record are erroneous. Bac. Abr. tit. Certiorari, G. Com. Dig. Certiorari, E. *Cross v. Smith*, 12 Mod. 643. *Reg. v. Nash*, 2 Ld. Raym. 959. See the opinion of Savage, Ch. J. in *Patchin v. Mayor, &c. of Brooklyn*, 13 Wend. 664, 665, 666. *Payfer v. Bissell*, 3 Hill, 239. *Gardner v. Murray*, 4 Yeates, 560. *Kingeland v. Gould*, 1 Halst. 161. *Maire v. Sparks*, 2 Southard, 513. Though where an execution is in process of being executed, it is not superseded by the allowance and delivery of the *certiorari*. *Regina v. Nash*, cited *supra*. *Meriton v. Stevens*, Will. 271. *Blanchard v. Myere*, 9 Johns. R. 66. *Payfer v. Bissell*, cited *supra*. See also *Wilson v. Williams*, 18 Wend. 581; also 1 Cowen, 21. It has been held, however, in Pennsylvania, that a *certiorari* to remove the proceedings of justices under the landlord and tenant law of that state, is not a *superseedeas* to an execution. *Anon.*, 4 Dallas, 214. *Stewart v. Martin*, 1 Yeates, 49.

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requiring bail in certain cases, (11 sess. c. 2, s. 4,) upon *certiorari*, does not apply to the case of an indictment before a justice, under the statute of forcible entry and detainer; for it is not a judgment or order within the meaning of the act.

As the magistrate holds a court of a special and limited jurisdiction, and proceeded after his power was taken away by the *certiorari*, he became a trespasser, and is liable as such. (b) (Comy. Rep. 81. 2 Black. Rep. 1145, 1035. 1 Burr.

(b) Where a court has jurisdiction of the cause, *Le case del Marshalsea*, 10 Co. 76, a., and proceeds *inverso ordine*, or erroneously, an action does not lie against the court, the party who sues, or the officer or minister of the court, who executes the precept or process. *Easton v. Calendar*, 11 Wend. 91. *Hurst v. Wickwire*, 10 id. 102. *Horton v. Auchmoody*, 7 id. 200. *Curry v. Pringle*, 11 Johns. R. 444. *Smith v. Shaw*, 12 id. 257. *Yates v. Lansing*, 5 id. 282; 9 id. 395. *Reynolds v. Cock*, 3 Caines' R. 267. *Moor v. Ames*, id. 170. *Reynolds v. Church*, id. 274. *Reynolds v. Orvis*, 7 Cowen, 269. *Cunningham v. Bucklin*, 8 id. 178. *Van Sternbergh v. Kortz*, cited *infra*. *Bigelow v. Stearns*, 19 Johns. R. 3. *Caleb v. Cooper*, 15 id. 152. *Butler v. Potter*, 17 id. 145. *Vosburg v. Welch*, 11 id. 175, 177. Steph. N. P., Sharwood's ed. 2019. *Brodie v. Rutledge*, 2 Bay, 69. *Ambler v. Church*, 1 Root, 211. *Phelps v. Sill*, 1 Day, 315. *Young v. Herbert*, 2 N. & M'Cord, 368. *Reed v. Hood*, id. 168. *Ely v. Thompson*, 3 Marsh. R. 76. *Little v. Moore*, 1 South. 74. See *Tracy v. Williams*, 2 Conn. R. 113. *Evans v. Foster*, 1 N. Hamp. R. 374. See also 2 Bay, 1. Harper, 66. *Ross v. Rittenhouse*, 2 Dallas, 160. 1 Yeates, 443. But if the court have not jurisdiction of the cause, the whole proceeding being *coram non judice*, an action will lie against them. *Nicola v. Walker*, Cro. Car. 395. *Hill v. Bateman*, Str. 711. *Shergold v. Holloway*, id. 1102. *Perkin v. Proctor*, 2 Wils. 384. *Brown v. Compton*, 6 T. R. 424. *Wickes v. Caulk*, 5 Har. & J. 42. *Griffith v. Frazier*, 8 Cranch, 9. *Den v. Harnden*, Paine, 55. Hence where one of the bail had been arrested by process out of the Marshalsea, (*Le case del Marshalsea*, cited *supra*), for the purpose of satisfying a judgment obtained against a principal, in a cause of which the Marshalsea court had no jurisdiction, it was holden that an action for false imprisonment would lie against the party who sued, the marshal who directed the execution of the process, and the officer who executed the same. If, therefore, a magistrate commit a party where he has no jurisdiction, he is liable to an action of trespass. *Case v. Mountain*, 1 M. & G. 227.

Public policy demands that courts of inferior jurisdiction should be strictly estrained within the limits of their jurisdiction, and the law accords with this principle. It must, therefore, appear on the face of their proceedings that they acted within their limits, or such proceedings are *coram non judice* and

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596, 602. 8 Co. 114, 121. Str. 710, 993. Cowp. 640, 647. 1 Lord Raym. 454, 468, 470.)

void. The rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court, but that which is so expressly alleged. *Peacock v. Bell*, 1 Saund. 73. Per Cowen, J. in *Hart v. Seixas*, 21 Wend. 40, 46, *et seq.* Per Bronson, J. in *Bloom v. Burdick*, 1 Hill, 130, 139. *Foot v. Stevens*, 17 Wend. 483. *Kemp v. Kennedy*, 5 Cranch, 172. Pet. C. C. R. 36. *Albee v. Ward*, 8 Mass. R. 86. *Walbridge v. Hall*, 3 Verm. R. 114. *Smith v. Rice*, 11 Mass. R. 513. *Williams v. Blunt*, 2 Mass. R. 213. *Turner v. Bank of America*, 4 Dallas, 11. *Hunt v. Haggood*, 4 Mass. R. 122. *Clapp v. Beardseley*, 1 Aik. 168. *Martin v. McKinney*, Pr. Dec. 380. *Hall v. Howd*, 10 Conn. R. 514. *Hendrick v. Cleveland*, 2 Verm. R. 329. *Powers v. People*, 4 Johns. R. 292. *Hamilton v. Burum*, 3 Yerg. 355. *Latham v. Edgerton*, 9 Cowen, 227. *Stockett v. Nicholson*, Walker, 75. *Wooster v. Parsons*, Kirby, 27. *Wickes v. Caulk*, 5 Har. & J. 36. *McKenzie v. Ramsey*, 1 Bailey, 459. *Harvey v. Huggins*, 2 Bailey, 267. See 2 Overt. 215. *Den v. Turner*, 9 Wheat. 541. *Hill v. Pride*, 4 Call, 107. In the case of *Miller v. Seare et al.* 2 Wm. Black. 1141, 1145, De Grey, Ch. J. observes:—"In courts of special and limited jurisdiction, having power to hear and determine, a distinction must be made. While acting within the line of their authority, they are protected as to errors in judgment; otherwise they are not protected. So in Dr. Bonham's case, false imprisonment lay, because they had exceeded their authority. In Dr. Groenvelt's it did not lie, because they were within their jurisdiction. In Dr. Bouchier's case, and the case of Terry and Huntingdon in Hardres, [p. 480; cited 12 Mod. 392,] it lay because of the excess of jurisdiction. Thus much of courts. The case is stronger, when applied to single magistrates, having or not having jurisdiction. [See this subject fully discussed in *Perkin v. Proctor*, 2 Wils. 384. [See also *Brittain v. Kinnaird*, 1 Brod. & B. 432; 4 B. Mo. 50, and cases there referred to. *Milward v. Caffin*, 2 Wm. Bl. 1330.] In all the cases where protection is given to the judge giving an erroneous judgment, he must be acting *as judge*. The protection, in regard to the superior courts, is absolute and universal; with respect to the inferior, it is only while they act within their jurisdiction." See *Dr. Bouchier's case*, considered by Spencer, J. in *Van Sternbergh v. Kortz*, 10 Johns. R. 167, 170. Where, therefore, no jurisdiction to do a particular act is shown by an inferior tribunal, the officer doing it is subject to an action, if it result in an injury to the property or the person of any one. *Adkins v. Brewer*, 3 Cowen, 206. If void process be issued, even though no malice enter into the act, trespass will lie, not only against the plaintiff, but also against the magistrate. *Id.* Per Jackson, J. in *Hayden v. Shed*, 11 Mass. R. 500. *Smith v. Rice*, *id.* 507. Sedgewick, J. in *Albee v. Ward*, 8 *id.* 79. *Van Sternbergh v. Kortz*, *ut supra*. *Kennedy v. Terrill*, Hardin, 490. See *Prince v. Thomas*, 11 Conn. R. 472. As where a justice (in Massachusetts) issued an execution, within two or three

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The only question, therefore, is as to the extent of the damages to be recovered, or whether the defendant is to be made responsible for the consequential damages of the *ouster*.

In this case the trespass is laid with a *continuando*; but the distinction, as to the amount of damages to be recovered in this action, is this; after an *ouster*, you can only recover for the simple trespass or the first entry: for, though [*29] *where there is an *ouster*, every subsequent act is a continuance of the trespass, yet in order to entitle the plaintiff to recover damages, for the subsequent acts, there must be a *re-entry*. But after a *re-entry* he may lay his action with a *continuando*, and recover *mesne profits*, as well as damages, for the *ouster*. (1 Lord Raym. 692. 2 Salk. 639. 2 Lord Raym. 975, 977. 1 Leon. 302, 319. 13 Co. 600. *Menville's case*. 3 Black. Com. 210. Co. Litt. 275.) The present suit was commenced before any *re-entry* by the plaintiff; he is, therefore, entitled to recover damages for the *first entry* only, or single trespass, and not for the crops.(a) There must be a new trial, with costs to abide the event of the suit.

New trial granted.

hours after judgment was entered up, though by the statutes of 1783, c. 58, § 1, and 1784, c. 28, § 15, it was provided that the execution should not issue in any case until after the expiration of twenty-four hours after the entering up of judgment, *Briggs v. Wardwell*, 10 Mass. R. 356; or a warrant against the plaintiff as the father of a bastard child, though no complaint had been made to authorize it, *Poult v. Slocum*, 3 Blackf. 421; or an execution for costs under which the plaintiff's horse was sold, without jurisdiction. *Rembert v. Kelly*, Harper, 65. See the judgment of Marcy, J. in *Savacool v. Boughton*, 5 Wend. 170. Also *Borden v. Fitch*, 15 Johns. R. 121. *Prigg v. Adams*, 2 Salk. 674. *Griffin v. Mitchell*, 2 Cowen, 548. And the judgment of Nelson, J. in *Easton v. Callender*, 11 Wend. 90.

(a) Both possession and right of possession, (which right may exist as against the defendant without the legal title. *Birkley v. Presgrave*, 1 East, 224. *Chambers v. Donaldson*, 11 id. 65, 67. *Catteris v. Couper*, 4 Taunt. 547; et vide *Hughes v. Gilman*, 2 C. & P. 33. Per Best, Ch. J. in *Revett v. Brown*, 5 Bing. 9, and *Holmes v. Newlands*, 11 Ad. & Ell. 44. *Graham v. Peat*, 1 East, 244. *Duncan v. Potts*, 5 Stew. & Port. 82. *Townsend v. Kerns*, 2 Watts, 180,) must concur to enable one to maintain trespass *quare*

 Kelly v. Harrison.

KELLY, Widow, against HARRISON.

K., a native of Ireland, removed to New York in 1760, where he continued to reside until his death, in 1798. He left a widow in Ireland, at the time he removed from that country, having been married in 1750. His wife was a native of Ireland, having never left the country, but continued a subject of the king of Great Britain. It was held, that the wife of K. being an alien, could recover dower of these lands only, of which K. was seised before the American revolution, or the 4th of July, 1776, and not of those he acquired after that period.

The division of an empire works no forfeiture of a right previously acquired.

THIS was an action of *dower*. The cause was tried before Mr. Justice *Radcliff*, on the 18th of November, 1799,

clausum fregit. The gist of this action is an injury to the possession. *Bac. Abr. tit. Trespass, C. Bertie v. Beaumont*, 16 East, 33. *Rex v. Watson*, 5 id. 486, 487. *Alexander v. Bonnin*, 4 Bing. N. C. 799. U. S. Digest, by Metcalf, Perkins and Curtis, tit. Trespass, and authorities: *Austin v. Sawyer*, 9 Cowen, 39. *Brandon v. Grimke*, 1 N. & M. 356. *Addleman v. Way*, 4 Yeates, 218. *Chatham v. Brainerd*, 11 Conn. R. 60. *Torrence v. Irwin*, 9 Yeates, 210. *Wheeler v. Hotchkiss*, 10 Conn. R. 225. *Skinner v. McDowell*, 2 N. & M. 68. *Truss v. Old*, 6 Rand. 556. *Cooke v. Thornton*, id. 8. *Shenk v. Mundorf*, 2 Brown, 106. *Bigelow v. Lehr*, 4 Watts, 377. *Campbell v. Arnold*, 1 Johns. R. 511. *Kempton v. Cook*, 4 Pick. 305. *Wickham v. Freeman*, 12 Johns. R. 183. *Stuyvesant v. Tompkins*, 9 id. 61. *Walton v. Clarke*, 4 Bibb, 218. *Peersoon v. Dansby*, 2 Hill (S. Car.) 466. *Beggs v. Thompson*, 2 Hamm. R. 95. *Norwood v. Shipley*, 1 Har. & J. 295. *Tomlinson v. Riser*, 2 id. 444. *Rhodes v. Bunch*, 3 M'Cord, 66. *Taylor v. Townsend*, 8 Mass. R. 411. *Shepard v. Pratt*, 15 Pick. 32. *Owings v. Gibson*, 2 A. K. Marsh. 515. As to constructive possession, see *Davis v. Olancy*, 3 M'Cord, 422. *Bulkley v. Dolbeare*, 7 Conn. R. 233. *Gillespie v. Dew*, 1 Stewart, 229. *Aikin v. Birch*, 1 Wend. 466. *Goodrich v. Hathaway*, 1 Verm. R. 485. But see *Poole v. Mitchell*, 1 Hill (S. Car.) R. 404.

Trespass will lie for the original ouster without a re-entry, *Taylor v. Townsend*, cited *infra*; but as possession is an essential requisite to this action, one who is dispossessed can maintain trespass for no act subsequent to that which ousted him from the premises, but after re-entry he may sue for all the intermediate acts of trespass. 3 Com. Dig. tit. Trespass, B. C. Per Parker, J. in *Taylor v. Townsend*, 8 Mass. R. 411, 415. See also per Parker, *arg.* in *Proprietors of Kennebeck v. Call*, 1 Mass. R. 483, 486. As to the *continuando* in trespass, add to the authorities cited by the court, 2 Roll. Ab. 545, pl. 1; and see generally upon this subject, 2 Chit. Pl. 5th Am. ed. 846, n. (a.) 2 Saund. Pl. and Ev. 855.

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when a verdict was found for the demandant, subject to the opinion of the court, on a case containing the following facts :

The marriage of the demandant, seisin and death of her husband were admitted. The demandant, and her husband, John Kelly, were born in Ireland, where they were married in the year 1750. About the year 1760, John Kelly, came to the city of New York, where he resided at the commencement of and during the American revolution, and continued to reside in the state of New York, until his death, which happened in the autumn of the year 1798. The demandant is a subject of the king of Great Britain [*30] having *continued to reside in Ireland from her birth to the present time.

B. Livingston and *D. A. Ogden*, for the demandant, cited Plowden, as to alienage, 21, 26, 27, 81, 82, 119. 1 Vent. 417. 1 P. Wms. 127. 7 Co. 54. *Calvin's case*, Kirby's Rep. 413. Bract. 427. Stat. 7 and 10 Anne, Treaty of Peace of 1803, (5 and 6 art.) Treaty of Amity in 1794, (9 art.) Molloy, 238. Goldsb. 29. 5 Co. *Page's case*. Moore, 4. Dyer, 282. 7 Term Rep. 398.

Troup and *Harrison*, for the defendant, cited 1 Bac. Abr. tit. Alien, (B) and (C).

RADCLIFF, J. It appears that John Kelly was a subject of Great Britain previous to the revolution ; that he resided at that time in the city of New York, and continued to reside in this state until his death, in 1798. His widow, the present demandant, has always resided in Ireland, and continued a British subject. She had, therefore, antecedent to the revolution, a capacity, in the event of her husband's death, to take and demand her dower. The question is, whether by the revolution she is deprived of that right. If the case had been silent as to her continual residence abroad, it might have been presumed that her condition followed that of her husband ; but she is expressly stated to be a British subject, and always to have remained in Ireland. I think the validity of her claim, therefore, depends on the general question, how far the rights of individuals with regard to property, are af-

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fectured by the revolution. The treaties between the United States and Great Britain do not appear to me to reach this case. The one of 1783, merely forbids all forfeitures and confiscations on either side, and that of 1794, provides, that the subjects and citizens of both nations, *holding lands* in the territories of the other, may *sell, devise and dispose* of them at their pleasure, and shall be entitled to all legal remedies, &c. These provisions seem only to relate to rights that are vested and *complete. The in- [*31] terest now claimed was not vested either at the time of the revolution, nor at the date of either of those treaties, and is, therefore, to be considered as independent of them.

In general, the severance, or revolutions of empire, I think, ought not to affect the rights of individuals with regard to property, and it does not appear to me, material, whether that right be contingent or absolute. It is sufficient that it had a commencement or inception, and actually attached to a specific subject. In the present case the demandant by her intermarriage with John Kelly, had, previous to the revolution, acquired a right, eventually, in case of his death, to be endowed of the estate of which he was then seised. The right was thus far acquired, and although dependent on the contingency of her surviving him, she ought not to be deprived of it by the circumstance, that a revolution intervened, before the contingency happened. Until the period of the revolution, she, therefore, had a capacity and a right to be endowed at his death, of the lands of which he was *then* seised, and had been seised during the coverture, and that right must be deemed to continue. I think, however, it ought not to be extended beyond that period, and applied to lands subsequently acquired. At the revolution she became an *alien*, and her husband an American citizen. The independence of this country, by creating a new sovereignty, necessarily had that effect. (Black. Com. 131; Co. Lit. 31.) The general principle, therefore, that an alien cannot be endowed seems to be properly applicable to all lands which her husband acquired, in the character of an American citizen. This qualification of her claim will not affect any

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right which had actually attached, at the period of the revolution, and such rights only are we bound, by the policy and justice of the case, to maintain. She had it in her power to pursue the condition of her husband, and entitle herself to the like claim in his subsequent estate. Not having done this, she must be deemed to have continued a British subject, and ought from that period to be restricted to her rights as such.

[*32] "I am, therefore, of opinion, that the demandant is entitled to judgment, in respect to those lands only, of which her husband was seized before the revolution; to wit, on the 4th of July, 1776.

KENT, J. The demandant must be considered as an alien. She was not in fact a resident of the United States, at the declaration of independence,^(a) nor do I perceive

(a) An alien is defined to be one who is born out of the ligeance of the king, Com. Dig. tit. Alien, A.; Lit. Sec. 198; Wood's Inst. 23; 1 Inst. 198, b.; 1 Wood, 396; *Calvin's case*, 7 Co. 16, a.; or commonwealth, per Parsons, Ch. J. in *Atwell v. Martin*, 9 Mass. R. 454, 459; *Martin v. Woods*, id. 377; as for example one born within the British dominions before the American revolution, and who was never in the United States. *Principal case*. *Jackson v. Burns*, 3 Binney, 75. *Dawson v. Godfrey*, 4 Cranch, 321. *Lambert's Lessee v. Paine*, 3 id. 97. And see S. C. per Minor, *arg.* 104-108. The distinctions between the *antenati* and *postnati*, in reference to our revolution, have frequently been the subject of judicial discussion. The latter are citizens by a tie too strong to be dissolved without the assent of the government. (*United States v. Gillies*, Peters' C. C. R. 161. *The Same v. Williams*, 4 Hall's Am. Law Journal, 361. See 2 Cranch, 82, n. *Ainslie v. Martin*, cited *supra*, per Parsons, Ch. J. See also *Inglis v. Sailors' Snug Harbor*, 3 Peters, 125. *Talbot v. Janson*, 3 Dallas, 133. See *Murray v. The Charming Betsey*, 2 Cranch, 190. *Murray v. McCarty*, 2 Munf. 393. *Santissima Trinidad*, 7 Wheat. 346, where this question is stated, but not determined. See also 2 Kent's Comm. 43-50, where the question is considered whether the English doctrine of perpetual allegiance applies in its full extent to this country.) But whether the former are so, depends upon their intention to enter into the Commonwealth at the time of its formation, or to avoid it and seek some other allegiance. In *Jackson v. White*, 20 Johns. 313, Spencer, Ch. J. said:—"We are called upon to discuss and decide this question, as a mere matter of private right, when all the feelings and passions, incident to so mighty a revolution, have subsided. I think it cannot be doubted, that when a people, from a sense of the viciousness of the government under which they have lived, are driven to the necessity of redressing themselves,

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that she can be considered a resident, by construction of law. If she had been here previously, and was at the time absent,

by throwing off the allegiance which they owed to that government, and in its stead, erecting a new and independent one of their own, that such of the members of the old government only, will become members of the new, as choose voluntarily to submit to it. Every member of the old government must have the right to decide for himself, whether he will continue with a society which has so fundamentally changed its condition. For, having been incorporated with a society under a form of government which was approved, no one can be required to adhere to that society, when it has materially and radically changed its constitution. Every member submitted to the society as it was, and owed obedience to it, while it remained the same political society. When it divests itself of that quality, by an entire new institution of government, it cuts the knot which united its members, and discharges them from their former obligations. *Vat. b. 1, ch. 3, s. 33, and ch. 16, s. 195. Puff. 639.* These principles were expounded by Ch. J. M'Kean, in a very satisfactory manner, in *Chapman's case*, 1 Dal. 58. He observed, that in civil wars, every man chooses his party; but that all the writers agree, that the minority have individually an unrestrainable right to remove with their property into another country; that a reasonable time for that purpose ought to be allowed; and, in short, that none are subjects of the adopted government, but those who have freely assented to it. The cases mentioned by the writers on the laws of nature and nations, are not precisely analogous with the condition of the American provinces, at the commencement of our revolutionary contest. Ours was a civil war; in the event of failure it would have been regarded as a rebellion; it terminated prosperously and gloriously, and became a revolution. But, that there was an entire dissolution of the government, under which we lived as provinces, owing allegiance to the British crown; and that a new form of government, and a new organization of the political society took place, cannot be denied; and hence the case occurred in which every member of the old society had a right to determine upon adhering to his old allegiance, and withdraw himself; or to abide among us, and thus tacitly, or expressly, yielding his assent to the change, and becoming a member of the new society." And accordingly where a native of Great Britain, a soldier in the British army, deserted from that army during the war of the revolution, and was domiciled in Connecticut at the period of the treaty with Britain by which the independence of the United States was acknowledged; it was held that, by this treaty, he was released from his allegiance to Britain, and became a citizen of the United States. *Hebron v. Colchester*, 5 Day, 169. *S. P. Phipps' case*, 2 Pick. 394, note. So where such native was taken prisoner of war in 1777, and was never exchanged, but, not being confined, he voluntarily fixed his domicile in Massachusetts, where he remained till 1824. *Cumington v. Springfield*, 2 Pick. 394. In both these cases, the *animus manendi* existed. And in *Kelham v. Ward et al.* 2 Mass. R. 236, and in *Gardner v. Ward*, id. 244, n., it was decided that persons born in Massachusetts before the revolu-

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animo redeundi, or although she had never resided in America, yet if we could collect from the case, that the se-

tion, who had withdrawn to a British province during the war, and had returned before the ratification of the treaty of peace, retained their citizenship, notwithstanding their absence while hostilities continued. Their intention to adhere to the American government was in both cases the substantial ground of decision, and it was considered that had the same persons remained in the British province until after the treaty, they would have been British subjects, because they had chosen to continue their former allegiance, there being but one allegiance before the revolution, and that being to the sovereign of Great Britain. It was assumed, that Massachusetts had rightfully taken the rank of a sovereign and independent state, and that she lawfully succeeded to the right of self-government, the sovereignty being in the people as a body politic. All, therefore, who were born within her limits and who had not been expatriated voluntarily or by compulsion, had a right to claim the protection of her laws, and owed allegiance to her as their sovereign. But a British subject not born within Massachusetts, would not have become a citizen from the mere fact that he was here on the ratification of the treaty of peace. Opinion of the judges in *Phipp's case*, 2 Pick. 394. Upon this principle, therefore, persons born here before the declaration of our independence, who left the country *before that event*, and never returned, are aliens. *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Peters, 126. Where one came from England to New York, in 1774, at which time he was a major in the British army, and, having been arrested, in 1776, as a person disaffected to the American cause, he was, in August or September, 1776, a prisoner on parole, and remained as such at Albany until December or January following, waiting for a passport to join his regiment, when he either joined the British army or went to England, where he died, about 1800, being then a general in the British army; it was held that he continued a British subject. *Jackson v. White*, 20 Johns. 313. And a native, who left the province after the commencement of the revolution, and continued with the British until the close of the war, and then went with them to Nova Scotia, where he died in 1790, became thereby an alien. *Palmer v. Downer*, 2 Mass. R. 179, note. And also one who was born within the colony of New York, in the year 1760, and removed to Ireland in 1771, and at the declaration of independence was settled as an inhabitant within the British dominions, where he remained until 1795, when he returned to America, is an alien. *Hollingsworth v. Duane*, Wallace, 51. See also *Shanks v. Dupont*, 3 Peters, 242, 246. *McIlvane v. Cox*, 2 Cranch, 280. 4 Id. 269. *Respublica v. Chapman*, 1 Dallas, 53. *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Peters, 122, 123. As, therefore, citizenship is made to depend upon the choice of the party either to adhere to the old government or enter into the new, a reasonable time has been allowed within which to make the election. *Inglis v. Trustees Sailors' Snug Harbor, supra*. See further 2 Kent's Comm. 40, 41, 54, *et seq.* With regard to the common law right of *antenati*, and who did not become citizens, to take real property,

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paration between her and her husband, was intended to be temporary merely, and that, in the year 1776, she really

it is a principle of the common law, that the division of an empire creates no forfeiture of the previously vested rights of property. *Principal case.* Per Story, J. in *Terrett et al. v. Taylor, et al.* 9 Cranch, 43, 50. *Jackson v. Lunn*, *infra*, vol. 3, p. 109. *Apthorpe v. Backus*, Kirby, 407. Kinsey, Ch. J. in *Den v. Brown*, 2 Halst. 337. 'The leading case upon this subject is *Calvin's case*, 7 Co. 16, s., cited by Lansing, Ch. J. and Kent, J. That case was as follows:—Calvin was born in Scotland, after the crowns of England and Scotland were united on the head of James the First. The question was, whether he could maintain an assize of *novel disseisin* of lands in England. The plea was, 'that he was an alien, born at Edinburgh, within the kingdom of Scotland, and within the ligeance of the king of Scotland, and out of the ligeance of the king of England.' One of the objections on the part of the defendants was, that if *postnati* were, by law, legitimated in England, great inconvenience and confusion would follow, if the king's issue should fail, whereby those kingdoms might again be divided. But to this it was answered by the judges, that 'it is less than a dream of a shadow, or a shadow of a dream; for it hath been often said, natural legitimation respecteth actual obedience to the sovereign at the time of the birth; for as the *antenati* remain aliens to the crown of England, because they were born when there were several kings of the several kingdoms, and the uniting of the kingdoms by descent subsequent, cannot make him a subject to that crown to which he was an alien at the time of his birth, so albeit the kingdoms (which Almighty God of his infinite goodness and mercy divert) should by descent be divided, and governed by several kings; yet it was resolved, that all those that were born under one natural obedience, while the realms were united under one sovereign, should remain natural born subjects, and no aliens; for that naturalization, due and vested by birth-right, cannot, by any separation of the crowns afterward, be taken away; nor he that was, by judgment of law, a natural subject at the time of his birth, become an alien by such a matter *ex post facto*. And in that case, upon such an accident, our *postnatus* may be *ad fidem utriusque regis*, as Bracton saith, in b. 5, ch. 24, fol. 427.' See 3 Cranch, 106. The right to inherit of course depends upon the question, whether citizen or alien at the time of the descent cast. The British *antenati* have been consequently held to be incapable of taking lands by descent subsequent to our social compact. 2 Kent's Comm. 57. *Reed v. Reed*, cited 1 Munf. 225, and opinion of Roane, J. in appendix. *Dawson v. Godfrey*, 4 Cranch, 321. *Jackson v. Burns*, cited *supra*. *Blight v. Rochester*, 7 Wheat. 535. See *Lambert v. Paine*, 3 Cranch, 97. In *Den v. Brown*, 2 Halst. 305, it was held, that British *antenati* were not subject to the disabilities of aliens, as to the acquisition of lands *bona fide* acquired between the date of our independence and the treaty of peace in 1783, for the issue of the war was then undecided. See *Commonwealth v. Bristow*, 6 Call, 60. But in *Hunter v. Fairfax's Devises*, 7 Cranch, 603, and 1 Munf. 218, the line of

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meditated a removal here, and afterwards, effected it, or was prevented by inevitable accident, in such cases I might, perhaps, be disposed to consider the residence of her husband, constructively, as her residence. But the case before us will not justify any such intendment. Her husband had left her, six years previous to our independence, and the separation continued until his death, 1798. The inference from these facts must be, that there was a permanent separation, by agreement of the parties, and not being a resident within the United States, in July, 1776, either in fact or in law, nor naturalized since, she is an *alien*.

Being an *alien*, the next point that arises in the case is, how far she can support her claim of dower.

I admit the doctrine to be sound, (*Calvin's case*, 7, Co. 27, b. Kirby Rep. 143,) that the division of an empire works no forfeiture of a right, previously acquired, and as a consequence of it, that all the citizens of the United States, who were born prior to our independence, and under the allegiance of the king of Great Britain, would be still entitled in Great Britain to the rights of British subjects. But the rule will not apply, *e converso*, that British subjects have with us the privileges of citizens; and for this evident reason, that the sovereignty of the United States was created by the act [*33] of independence, and "there could be no previous right acquired in respect to it, and consequently none to lose, nor could it include any persons, other than residents at the time, within its jurisdiction. The revolution, accordingly, left the demandant where she was before, and impaired no right she then enjoyed. She is entitled now to dower in all lands of which she would have been dowable, had her husband died at that time. But being an *alien* she cannot since have acquired rights of property which aliens are not permitted to acquire; and to render her dowable of lands pur-

distinction between aliens and citizens was considered to be coeval with our existence as an independent nation; and, therefore, that the British *entitled* could not acquire any other than a defeasible title to lands in Virginia, between the date of our independence and the treaty of peace in 1783. See 2 Kent's Comm. 57, 58.

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chased by her husband subsequent to July, 1776, is to vest her with a right not then vested.

By marriage, she was capable of being endowed of lands purchased by her husband at any time during the coverture. But the right could not attach till the land was purchased, and I distinguish between the capacity to acquire and the vested right. The revolution took away the one, and did not impair the other.

I am of opinion, therefore, that if the lands of which dower is now claimed, were owned by the demandant's husband, on the 4th July, 1776, she is entitled to dower; otherwise, not.

BENSON, J. concurred.

LANSING, Ch. J. It has already been stated, that the only question which arises in this cause is, whether the demandant is capable of taking as *tenant in dower*?

It was admitted in argument, that the demandant, prior to the declaration of independence, had a capacity to take as such.

In determining this question, I do not think it necessary to enter into a minute consideration of the effects which the separation of the United States from Great Britain, had on the situation of the subjects of that crown, inhabiting its dominions, *beyond* those states, as respects their rights *in them*, prior to the revolution.

"I think, however, neither justice, sound sense, nor [*34] the just interpretation of the authorities submitted to our consideration, or such as I have had an opportunity of examining with a view to this question, impose it upon the court to decide on principles analogous to those which influenced the decisions of the English courts in the several stages in which they acquired or lost their continental possessions.

The event most analogous in English history to the separation of the United States from Great Britain, is that of the loss of Normandy. The Normans claimed England by conquest, and, however much it may be affected to be disguised, actually exercised the most rigorous rights derived

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from that source ; and though in process of time Normandy became only a secondary object to the successors of William the Conqueror, it might justly be considered, as the superior or ruling state, as long as the rights of sovereignty of both countries were centered in the same person.

Their sovereign, however, remained in England. Upon the separation of those states, it appears from 7 Co. 20, that it was held there, *that all such lands as any Norman had, either by descent or purchase, escheated to the king, for their treason in revolting from their liege lord and sovereign.* This was on the principle of a rebellion against their feudal chief ; but the dictates of policy must, obviously, have exclusively influenced an opinion so extremely rigorous and unjust, as to define the treason by territorial limits, and to subject the Normans, however diversified their cases might be, *in consequence of their promoting or assisting the separation,* to an indiscriminate loss of property.

This case cannot, therefore, be admitted as of any weight in forming a rule here.

In all the other instances presented in English history, the countries lost or acquired, were merely in right of the crown. The principle is universally admitted in all the authorities, that birth in its locality, is the test of subjection. A person under the allegiance of that crown, has a community [*35] of rights as a subject, and owes allegiance to it as such. The object to which that allegiance attached continues to exist ; and a new modification of the forms of government, as respected its executive, would not be permitted to vary its application.

But the present case appears under a somewhat different aspect. The United States formed a portion of the British dominions, but had no constitutional influence on the national will ; the colonies were confessedly subordinate. Among them were found no objects to which allegiance, as derived from the previously existing government, could attach. I merely hint at this distinction, as I do not mean to pursue or give any opinion on it. It is important, but the manner in which I contemplate the subject, does not lead me to a particular investigation of its tendency.

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It is admitted, that the demandant once had a capacity to take. Her husband obtained the right of acquiring and holding real estate in this state, until his death. There is no pretence that the long separation between them, is to be attributed as a fault to her. She must, therefore, in legal intendment, be considered as under the control of her husband. It does not appear that, as to him she has done any act to forfeit her dower. Her residence in Ireland, in legal construction, must have been dictated by her husband; and her domicile, constructively, is that of her husband.(a)

I am, therefore, of opinion, that she is entitled to recover, whether the seisin of her husband of the land of which she claims her dower, was before or after the revolution.

LEWIS, J. was of the same opinion.

Judgment for the demandant, for dower in lands of which her husband was seised prior to the revolution.

(a) A married woman follows the domicile of her husband. Voet ad Pand. lib. 5, tit. 1, No. 101. Warrender v. Warrender, 9 Bligh, 89, 103, 104. Greene v. Greene, 11 Pick. 410. This results from the general principle that a person who is under the power and authority of another, possesses no right to choose a domicile. Eucyc. Am. tit. Domicil. Poth. Cout. d'Orleans, c. 1, art. 10. 2 Domat Pub. Law, b. 1, tit. 16, § 3, art. 11, 13. Merlin Repert. Domicil, § 5. *Mulierem quamdiu nupta est, incolam ejusdem civitatis videri, cujus maritus ejus est.* Dig. lib. 50, tit. 1, l. 38, § 3. Id. lib. 5, tit. 1, l. 65. Pothier Pand. lib. 50, tit. 1, No. 24. 2 Domat Pub. Law, b. 1, tit. 15, § 3, art. 12. Voet ad Pand. lib. 5, tit. 1, No. 101. And upon this general principle, minors are generally deemed incapable *proprio Marte* of changing their domicile during their minority, and therefore they retain the domicile of their parents, and if the parents change their domicile, that of the infant children follows it; and if the father dies, his last domicile is that of the infant children. Dig. lib. 50, tit. 1, l. 9. Pothier Pand. lib. 50, tit. 1, n. 3. Cout. d'Orleans, c. 1, art. 12, 16. 2 Domat Pub. Law, b. 16, tit. 16, § 3, art. 10. Guier v. O'Daniel, 1 Binney, 349, 351. Voet ad Pand. lib. 5, tit. 1, n. 91, 92, 100. Story on Conflict of Laws, § 46. See also Burge Comm. on For. & Col. Law, vol. 1, p. 32-57. Henry on Foreign Laws, App. A. 181-209. Denizart Dic. art. Domicil. Merlin Rep. art. Domicil. Encyclopedia Moderne, art. Domicil. Encyclop. Americana, tit. Domicil.

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[*36] *LOOMIS AND TILLINGHAST *against* SHAW.

Goods were insured from New York. to Havre, and a separate policy was also made on the *profits*. The vessel was captured and carried into London, and the goods libelled there. Five-eighths of the goods were restored to the insured who received and appropriated them to their own use. The insured abandoned to the insurers on the policy on the *profits*, as for a total loss. The insured claimed and recovered an average loss of three-eighths only on the goods. It was held that they were entitled only to a partial loss of three-eighths on the profits.

THIS was an action on a policy of insurance on the *profits* of goods laden on board the ship Favorite, on a voyage from New York to Havre. The ship and goods were captured by a British cruiser, and carried into London, and libelled in the court of admiralty there. Five-eighths of the goods were restored to the plaintiffs, and accepted by them, and appropriated to their own use ; and the remaining three-eighths were detained in court, but whether condemned or not did not appear. By the capture, the voyage to Havre was broken up, and none of the goods ever reached France. Under the policy on the cargo, the plaintiffs claimed and recovered an average loss of three-eighths only. They abandoned to the defendant, and the question on this policy was referred to referees, who reported in favor of the plaintiffs, as for a total loss. The point now submitted to the court, by consent, was whether the plaintiffs are entitled to a total or partial loss only, and the report was to be confirmed or modified accordingly.

B. Livingston, for the plaintiff.

Harison, for defendant.

RADCLIFF, J. delivered the opinion of the court. The plaintiffs are entitled to recover a partial loss only. Profits are necessarily incidental and subject to the final disposition of the goods on which they are expected to accrue. The plaintiffs in the present case have actually received five-eighths of the goods, and appropriated the proceeds to their own use. Whether they yielded any profit, or sold at a loss, does not

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appear; and it is not material, since the plaintiffs chose to accept them at London, and take the benefit of the market there. They are, therefore, at most, entitled to an average loss of three-eighths only.

*Let the report of the referees be reduced, and judgment be entered accordingly. (a)(b) [*37]

 JACKSON, *ex dem.* GIFFORD, *against* SHERWOOD.

The boundaries of Hoosick patent are to be taken according to the survey and map made for the partition thereof, in 1754. (c)

THIS was an action of ejectment. The cause was tried at the last Rensselaer circuit, before Mr. Justice Benson.

The plaintiff claimed under a patent from the state, dated the 14th of August, 1786, to William Shepherd and Joshua Mercereau, and deduced a regular title by deed to the lessor for one-tenth and one-eighth parts of the lands in the patent.

The lands in the patent to Shepherd and Mercereau, are bounded on the north, by the south bounds of another patent, called the Hoosick patent, granted the 28th July, 1688, in which the boundaries are described as follows: "All that tract of land, with its appurtenances, situate, lying and being above Albany, on both sides of a certain creek, called Hoosick, *beginning* at the bounds of Shackook, and from thence extending to the said creek, to a certain fall called Quiquek, and from the said fall upwards along the creek to

(a) Old note. See *Tom v. Smith*, (3 Caines, 245.) *Mumford v. Hallett*, (1 Johns. Rep. 433.)

(b) See 1 Phil. on Ins. 122-126; 2 id. 226, *et seq.*; id. 364; and *Abbott v. Sebor*, *infra*, vol. 3, p. 39.

(c) See upon the construction of this patent, *Jackson ex dem. Judwin v. Joy*, 9 Johns. R. 102; *Jackson ex dem. Tibbette v. Williams*, 2 id. 297, and S. C. in Error, 5 id. 489; *Jackson ex dem. Quackenbush v. Dennis*, 2 Caines' R. 177.

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a certain place, called Nachawickquack, being in breadth on each side of the said creek, two English miles, that is to say, two English miles on the one side of the said creek, and two English miles on the other side of the said creek, the whole breadth being four English miles, and is in length from the bounds of Shackook aforesaid, to the said place, called Nachawickquack."

It was admitted, that if the premises in question were not included in the boundaries of the Hoosick patent, then the plaintiff was entitled to recover; but if they were so included, then the plaintiff must fail.

[*38] *The plaintiff produced a witness who testified, that all the premises in question, were within the distance of two miles from some part of Hoosick creek, so that if the south boundary of Hoosick patent is two miles from any part of the creek, the premises in question are included in the Hoosick patent; but if the south boundary of the Hoosick patent, is to run two miles distant from, and parallel with, a line running equidistant from two lines, both parallel with the general course of the creek, the one on the north side thereof, so as just to touch the creek at its extreme windings northerly, and the other on the south side of the creek, so as just to touch the creek in its extreme windings southerly, allowing the said lines to be extended in length, as far only as they could be extended in a straight line without crossing the creek, (and which was the mode taken by the patentees of Hoosick, to reduce the boundaries of the patent to a certainty, on making a partition thereof,) then the premises in question would not be included in the Hoosick patent, but would be part of the patent to Shepherd and Mercereau, under which the plaintiff claims.

The defendant insisted, first, that the premises in question were part of the Hoosick patent. Secondly, that if they were not included within the bounds of that patent, still the lessors of the plaintiff had been so long out of the possession of the premises, that they were not entitled to recover.

The defendant proved, that every part of the premises in

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question were less than two miles distant from the Hoosick creek ; that about 17 years ago, there was a line of marked trees which then was, and ever since has been, universally reputed the south bounds of the Hoosick patent, which line then appeared to have been marked 20 years prior to that time ; that this line included the premises in question, as part of the Hoosick patent ; and that it then was, and ever since has been, the general reputation of the *county, [*39] that the premises in question were parcel of lot No. 46, in the patent of Hoosick.

As to the second ground of objection, the defendant proved that persons claiming to hold under one Van Ness, had been in possession of lot No. 46, about fifty years ; That on account of the small number of inhabitants in that vicinity, there was no general reputation as to the south of the lot No. 46, farther back than about 17 years. It appeared that the Van Ness mentioned, was Hendrick Van Ness, one of the patentees of the Hoosick patent.

There was no evidence that the lessor, nor any of the persons under whom he claimed, had ever been in possession of the premises in question ; but the defendant had been in possession of the premises ever since they were inclosed. and prior to the patent to Shepherd and Mercereau.

A map of the partition of Hoosick patent was made in 1754, and lot No. 46, was one of the lots into which the patent was divided. This map was produced in evidence. Two surveyors were produced as witnesses, who testified, that different modes were taken by different surveyors, for reducing to certainty the boundaries of lands described in the manner the bounds were described in the Hoosick patent, and that in the opinion of the witnesses, the mode adopted to ascertain the boundaries, in order to make the said partition, was, under the circumstances, as equitable and as practicable as any other.

The judge charged the jury, that as the patentees of Hoosick patent, had elected that mode of ascertaining the boundaries of their patent, they, and all persons claiming

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under them, were concluded by it. The jury found a verdict for the plaintiff.

A motion was made to set aside the verdict, and for a new trial, which was argued by *Bliss* and *Woodworth*, for the defendant, and *Emott*, for the plaintiff.

[*40] *RADCLIFF, J. The plaintiff claims under a patent granted to Shepherd and Mercereau, in the year 1786, and derives his title, by sundry mesne conveyances, from those patentees. It appears that neither he, nor those under whom he claims, were ever in possession of the premises in question, but that the defendant has possessed them, under an opposite title, ever since they were inclosed or cultivated, and for a long time previous to the date of the patent. During all this period, therefore, the possession was held adverse to the plaintiff's title, and although the government might be considered as competent to grant its right, when reduced to a *chose in action*, it was not competent for the grantees to convey it to another. The subsequent conveyances under which the plaintiff claims, were void, as founded on maintenance, and could not pass the title. This principle alone opposes a bar to the plaintiff's recovery.

2. From the testimony of the cause, and an examination of the map, which was in evidence at the trial, and accompanies the case, it appears that all the premises in question, lay within two miles of the Hoosick river. They are, therefore, on the most rigorous construction, within the patent of Hoosick, which being the elder patent, must first be satisfied.

3. If we admit the location made by the proprietors of the Hoosick patent in 1754, to be conclusive, the premises are equally within it. This will also appear from an inspection of the map, and the modes of survey there adopted. On every ground, therefore, I think the plaintiff cannot recover.

The case presented to the court, is, however, obscure, and, in some respects, apparently inconsistent. It may, at least, be said, that there are not sufficient facts to enable us to decide with safety on the rule which ought now to prevail

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in establishing the boundaries of the Hoosick patent. Independently of the location made by the patentees, and the possessions held under it, the original construction of its boundaries might be attended with some difficulty. The "plain and obvious mode to satisfy the terms of [*41] the grant, would be to give them the extent of two miles on each side of the Hoosick river, conformable to all its windings, if that be practicable. Several other modes have been suggested, and analogies between this and other cases attempted, which appear either arbitrary in themselves, or too loose and uncertain to furnish a rule for decision. Boundaries of a similar description have, I believe, in many instances, either been settled by accommodation, or established by a length of possession, and the acquiescence of all parties. But there is not sufficient evidence before us of the possessions on the exterior lines of this patent, under the location of 1754, to proceed on that ground, or of the *notoriety* of that location, to ascertain how far those lines had acquired a *prior reputation*, as to the boundaries of Hoosick, antecedent to the patent of 1786. If those lines and the possessions in conformity to them, had, previous to that period, been generally known and understood to form the boundaries of Hoosick, it might be a fair construction of the subsequent statute, to limit its northern extent by the *reputed* boundaries of Hoosick. They might then be considered as the boundaries *de facto*, which both government and the subsequent patentees had in view. But I think enough does not appear to determine generally the question on either of those patents, and I, therefore, in the present case, confine myself to the points first mentioned; and am of opinion, that the verdict ought to be set aside, and a new trial granted.

KENT, J. 1. It appears that the lessor of the plaintiff claims, by mesne conveyances, under the patent of 1786; and that at the time of those conveyances, the premises must have been held adversely by the defendant, so that nothing passed by the deeds. This objection, however, would only serve to turn the plaintiff round to a new suit, in the name of the persons from whom he derives his title, and would

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not answer the expectations of the parties, who undoubtedly *intended by the case, to bring the merits of the controversy before the court. I shall then proceed to consider it further.

2. It is said that, under all the circumstances of the case, the party taking the patent of 1786, and by which he is bounded generally on the patent of Hoosick, ought to be concluded by the boundaries of the patent of Hoosick, as they existed in fact, and by reputation, at the date of the last patent. It ought to be observed, that the Hoosick patent is a very ancient one; that the description of its boundaries is susceptible of different constructions; that the patentees* in 1754, by a map of partition, located those boundaries; and that the patent had a reputed boundary, which included the premises, at the time of the patent of 1786. The patentee of 1786 must be presumed to have knowledge of the location and map of 1754, and the reputation of the boundaries, as existing since; and for the sake of peace, and to quiet possession, it becomes a reasonable and useful construction, to restrict the boundary of the latter patent to the actual boundary of the former. By this construction, the words of the last patent can be satisfied; whereas the necessary consequence of the construction set up by the plaintiff is litigation, by disturbing possessions held under a location, long anterior to the patent. On this ground, I think the lessor of the plaintiff has failed.

3. But admitting that we ought now to ascertain from the patent of Hoosick itself, what is its true south boundary, the result in my opinion is the same. The natural and easy construction of the description of the boundaries appears to me, that of lines parallel with the creek, at two miles distance from it, on each side, and following the windings of the same, as far as they will permit, so as not, however, in any instance, to approach nearer than two miles of the main channel of the creek. The line must follow the course of the river, from the place of beginning to the place of ending, and in doing so, it is not sufficient to follow the general course of the creek. There is nothing sufficiently precise

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in that. But to follow the actual *course of the [*43] creek, in all its inflexions, with the exception, nevertheless, of such (if any there be) as would require a nearer approach than two miles to the creek, is to do a thing capable of mathematical certainty.

We have something like an analogous case, in the northern boundary line of Massachusetts. By the charter of that colony, the line extended from three miles north of the Merrimac river, to the south sea. This was determined to extend to three miles north of the mouth of the river, (2 Hutch. Hist. Mass. 383, 386, 388; 1 Doug. Summary, 421, 422, 423; 3 Belknap Hist. New Hamp. 9,) and to run parallel with the river, keeping three miles distant, and pursuing a course similar to the curvature of the river, until it came to such an inflexion, at Patuket falls, as would, if pursued, be inequitable and defeat other grants.

Upon this construction, the plaintiff fails, for it is stated in the case, that all the premises lie within two miles from some part of the creek. So that upon either of these three grounds, I am of opinion that the verdict must be set aside.

BENSON, J. and LEWIS, J. concurred.

LANSING, Ch. J. On the motion, on the part of the defendant, to set aside the verdict in this cause, it was stated,

1. That the premises were included in the Hoosick patent.

2. That the plaintiff had been so long out of possession, that he was not entitled to recover.

As connected with the first point, the position laid down by the judge, that the patentees having elected the mode exhibited in the map, for ascertaining their boundaries, *were concluded by it, and all claiming against them were also concluded*, demands a primary consideration, for if this can stand the test of examination, it is needless to inquire what were the real boundaries of the patent.

*That such a location of an ancient date, known [*44] and acknowledged by the proprietors of the adjoining patents, for a long series of years, or tacitly acquiesced in, by permitting the settlements and possessions to define its

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lines, ought to be respected, and under certain circumstances, admitted to conclude the parties interested, I do not mean to question, but I cannot discover any ingredients requisite to produce this effect in the present case.

All that appears from the case respecting the map is, that it had been proved, " that a map of partition of the patent of Hoosick, was made in the year 1754, and that lot No. 46 was one of the lots into which the patent was, in that partition, divided."

It is then a naked fact, that a map of partition was made in the year 1754. It does not appear to have been publicly known; nor does it appear, that the possessions of the proprietors who compiled that map, were co-extensive with the lots laid out. But it is proved, that persons *claiming to hold under one Van Ness*, had been in possession of lot No. 46, about 50 years. That as far back as 17 years ago, and ever since, the premises in question have been uninterruptedly reputed by that neighborhood, to be parcel of lot No. 46. And, it is added, that the defendant had been in possession of the premises, *ever since they were inclosed or cultivated*.

This map, if it ought to be considered as concluding the parties in interest, could not possibly affect the rights of strangers *in the first instance*. The making a map of a tract of land, is a process of daily occurrence. To include in it a greater extent of lands than fair construction will warrant, is not uncommon. But as *ex parte* acts, they are of little avail.

This map is so far from concluding, that it cannot be admitted in evidence, to the prejudice of strangers to the transaction. But a uniform and long continued acquiescence, as well on the part of the parties making it, as on those intrusted in repelling encroachments on the adjoining tracts, might have stamped it with a higher degree of verisimilitude.

[*45] It would then have assimilated with a usage. *It would have formed part of the evidence, if not of its existence, at least of its origin, and the substantive objects distinguishing the boundaries, by continuing to be re-

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spected as the *termini*, would have reflected a credit on the map, which it was destitute of before. If not so corroborated, the lapse of time, which has intervened from its construction, in my opinion, can add nothing to its effective qualities.

I therefore conclude, that the map derives no aid from extrinsic circumstances; and, intrinsically, nothing is to be collected from it, as affecting persons not parties to it.

If the map does not conclude, then we are compelled to resort to the patent of Hoosick, to determine the question between the parties.

In giving a construction to the patent, I differ from the opinion given by the surveyors, who have been examined on the trial respecting it. As a question which has produced a variety of sentiments among persons most conversant in subjects of this kind, I feel some degree of diffidence on the occasion, but as I have formed an opinion, I consider it my duty to express it. And I do this with the less repugnance, because as my opinion does not accord with that of my brethren on this point, they having pursued the subject in a different course, it may afterwards be deliberately considered and tested, if it should again become an object of controversy.

The patent is described as extending between two points, on the Hoosick creek, more than twenty miles from each other, the precise distance it is not material to ascertain; it then proceeds, "being in breadth, on each side of the said creek, two English miles, that is to say, two English miles on the one side of the said creek, and two English miles on the other side of the said creek, the whole breadth being four English miles."

After attentively considering this subject, it appears to me, that the location of this patent ought to be made by lines running parallel to the creek, at the distance of two miles from it; such lines to be so constructed, as to "con- [*46] form to the sinuosities of the creek, and equidistant, on both sides from it.

That a conformation may exist, which would not admit

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of this construction of bounds described as in this case, I can easily conceive, and readily admit. But I take it, the court are not required to give a rule applying to every possible conformation. As well might it be required to lay down a rule, equally applicable to the inscription of a circle, and the construction of a square. If the rule will properly apply to all cases similarly circumstanced with the present, it is all that is necessary.

To exemplify this construction, suppose three concentric equidistant circles, correspondent to one of the curves of the creek, such curve forming a segment of the middle circle to be drawn. It is evident, that radii emanating from their common centre to the circumference of the exterior circle, will divide all the circles into portions of equal relative dimensions, as compared with the circumference of the circle of which they are respectively segments. But the relative dimensions of those segments, as compared with each other, will be greater in proportion, as the size of the circle, of which they form a portion, is increased. Hence the flexures on the exterior lines, require it to be extended on the projecting, and contracted on the retiring, curves of the creek; but notwithstanding this unavoidable extension or contraction, the lines may preserve their equidistant relation to the creek; and the distance of two miles, may be located throughout, between it and its corresponding windings in the exterior lines.

On the first impression, it appeared to me necessary to inquire, what angle the line of the patent of Schaghtikoke formed with the creek, at the place of beginning supposing that whether that was obtuse or acute, might influence the extent of the patent from the creek; but I am satisfied it ought not. The creek is the term to which the extent exclusively relates. The patent is to extend two miles from the creek, and the obvious intent of the expression, uncontrolled by other circumstances, is that it shall extend two miles from [47] the creek, measured at right angles "from the place of departure *on it*. And if it should be objected, that the line of the Schaghtikoke patent formed an obtuse angle on one side, and an acute angle on the other, from which the extent of

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the Hoosick patent was to progress, and if that was not assumed as the base, a vacant angle would be left, which was evidently not the intent of the government, the objection, in my opinion, may be satisfactorily obviated, by commencing the exterior lines of the patent on the lines of the Schaghtikoke patent, at the distance of two miles from the creek, measured at right angles therefrom.

The construction adopted by the framers of the map, is not correspondent to the one I suppose to be proper ; it does not give lines parallel to the creek, or parallel to each other. In some places, it departs from the creek, considerably more than two miles, in a few instances it approaches it, so as to be within that distance, and the description in the map is at variance with that in the case.

It is in proof that the premises in question, are considerably within the distance of two miles from the creek, and the only part of the proof, that appears not to be perfectly consonant to this is, that the premises are within two miles of *some part of it*.

From the inspection of the map, it seems that the formation of the creek, in that part which affects No. 46, is such, that though the premises are within two miles of some part of the creek, they may be excluded from the Hoosick patent, on the construction I take to be the true one ; and as both parties have reposed themselves on its delineations as correct, and confined themselves merely to controvert or defend the principles on which the patent was located by it, and they have submitted the map as part of the case, it is competent to aid in the decision of this case. If this, therefore, were the only point in the cause, my opinion would be for the plaintiff.

The second point is, that the plaintiff had been so long out of possession, that he is not entitled to recover. If this objection is accurately expressed, it is not well taken ; for from the date of the patent under which the plaintiff "claims, [*48] which was in 1786, the lapse of time could not bar his recovery. But the objection, in the course of the argument resolved itself into another : that during the time the meane

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conveyances under which the plaintiff deduces his title were executed, the defendant held the premises adverse to him. This, in my opinion, presents an insuperable bar to the recovery by the plaintiff; for if the premises in question, as is stated in the case, *were inclosed and cultivated, a long time prior to granting the said letters patent, and the defendant was in possession since that time*, the conveyances executed during such possession, *which appears notoriously to have been adverse*, could not pass any estate, and of consequence cannot afford a ground for recovery.

There is one other point, which would lead my mind to the same conclusion, and that is, that the patent of Hoosick had previous to the granting the letters patent, under which the plaintiff claims, acquired an extent, *as respects the line in controversy*, by reputation, and that the bounds of the latter patent are not defined by ascertained metes and bounds; but its bounds generally refer to and abut on the Hoosick patent.

This, I take it, in legal intendment, must refer *to the reputed boundaries only*, as a contrary construction, by devolving the undefined and totally unascertained rights of the state on the patentees, must introduce infinite confusion and litigation.

I, therefore, concur in the opinion that the verdict must be set aside.

New trial granted.

*PERCIVAL *against* JONES.

[*49]

Where a justice of the peace, under the ten pound act, issued an execution against the body of a defendant who was by law privileged from imprisonment, voluntarily, and without the request or authority from any plaintiff, it was held, that he was liable to an action for false imprisonment.

While a justice acts ministerially, or as a clerk of the party, he will be justified in issuing any process within his jurisdiction that may be demanded by the plaintiff. But in order to charge the plaintiff in the suit, it should appear that it was really his act; it ought not to depend on the general intendment of the law that every writ or process is purchased by the party in whose favor it issues.

THIS was an action of trespass, assault and battery, and false imprisonment. Plea not guilty. The cause was tried before Mr. Justice *Kent*, at the last sitting in New York.

The defendant was a justice of the peace in the county of Albany. A suit was commenced before him, in favor of one Chapin against the plaintiff in the present suit, in which a judgment was recovered in favor of Chapin. After the expiration of forty days, an execution was issued by the justice against the goods and chattels of Percival, and in case no goods or chattels could be found, his body was directed to be taken, which is the usual form of an execution *against a freeholder*, under the act. He was taken, by virtue of the execution, and imprisoned for thirty days in the jail in the city of Albany. It appeared that Percival, immediately after judgment was so obtained against him by Chapin, declared to the justice that he *was not a freeholder*, and had a family in Albany, where he was an inhabitant; which facts were proved at the trial. While he was proceeding, in the custody of the constable, to jail, he met the defendant, and again alleged that he was not a freeholder, and was an inhabitant of Albany; and had a family there, but the defendant directed the constable to commit him, according to his precept.

The jury found a verdict for the plaintiff. A question was reserved by the judge, whether if the plaintiff was not a freeholder, and had a family, the justice could be liable to

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a suit for issuing the execution, and whether the present action was the proper remedy. If the court should be of opinion that the justice was not liable, then a nonsuit was to be entered, otherwise, the verdict was to stand.

Spencer, for the plaintiff.

Riggs, for the defendant.

[*50] **Per Curiam*. By the 10th section of the act, commonly called the *ten pound* act, it is provided, that the justice shall grant execution, &c. against the goods and chattels, and for want of sufficient goods and chattels, against the body of the defendant. By the 15th section of the act, for the relief of debtors, with respect to the imprisonment of their persons, it is declared that no person, having a family, not being a freeholder, should be imprisoned by virtue of any execution, to be issued by virtue of the former act, and the form of the execution is directed to be against the goods and chattels only.

In the present case the plaintiff was an inhabitant of Albany, having a family, and not a freeholder. He has, therefore, been illegally imprisoned. He has sustained an injury, and his remedy must be by an action against the party or his agent who issued the execution. Justices of the peace, in making out process, act *ministerially*, as distinguished from their judicial acts. They act both as judge and as clerk, and in the latter capacity may, and, as to executions, they generally do, act as agents for the party. Mere ministerial officers who, as such, issue or execute process, cannot, nor ought to be responsible as long as the court from which it issues has general jurisdiction to award such process. But the party who sues out the process, does it at his peril, and he is responsible. (Doug. 676; 3 Wils. 346.)(a)

(a) In *Hoose v. Sherrill*, 16 Wend. 33, 42, Bronson, J. observes: "In *Percival v. Jones*, 2 Johns. Cas. 49, the defendant, who was a justice of the peace, was held liable in an action for false imprisonment for issuing an execution against the body of the plaintiff, who was exempt from imprisonment. What was said by the court in relation to the justice's acting as a ministerial officer in issuing process, and as such not being responsible, must be understood in reference to the particular circumstances of that case in which it was questionable, to say the least, whether the defendant ought to have been held liable."

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Some difficulty occurred in the construction of the acts which have been mentioned, as to the power and duty of a justice, in cases like the present. A defendant before him, under such circumstances, is exempted from imprisonment by the provision contained in the last act, but no mode is prescribed, by which the facts that entitle him to this exception are to be proved or ascertained. No mode can be supplied or assumed by the justice, for he can possess no power, nor adopt any course of proceeding, by construction or implication. Yet it is essential, that the justice, when acting with good faith, should be protected, for it would be intolerable to impose on him the necessity of knowing, officially, the property or circumstances of every person in the community. But, at the same time, "the privilege of [*51] the defendant must have its effect; and this can be done, with safety to the magistrate, in no other way than by considering the execution as issuing at the peril of the party demanding it. If the plaintiff is not satisfied with an execution against the goods and chattels, and wishes to take the body of the defendant, he must ascertain at his own risk, that the defendant is a freeholder.

In courts of special and limited jurisdiction, the rule is strict, that the party becomes a trespasser who extends the power of the court to a case in which it cannot lawfully be extended. (1 Stra. 710. 2 Black. Rep. 1035. Cowp. 640, 647. 2 Wils. 385, 386.)(a)

While the justice acts ministerially, or as clerk of the party, he will be justified in issuing any process, within his jurisdiction that may be demanded by the plaintiff. But in order to charge the plaintiff in the suit, it should appear that it was really his act; it ought not to depend on the general intendment of the law, that every writ or process is purchased by the party in whose favor it issues.(b) If it

(a) See *Case v. Shepherd*, *supra*, p. 27, and n. b. to p. 28.

(b) In *Gold v. Bissel*, 1 Wend. R. 210, 215, this principle is repeated and confirmed. So also in *Taylor v. Trask*, 7 Cowen, 249, 251, where it was held that a request to a magistrate to issue an execution in a case where the law clearly pointed out the kind of execution to be issued would not implicate

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appears to be the officious, or voluntary act of the justice, without any direct authority for that purpose, an innocent plaintiff ought not to be implicated. In such a case, the justice assumes the responsibility of the measure, and is liable for all its consequences. No authority to the justice, or demand of the plaintiff, is pretended, in the present case. The justice was told by Percival that he was not a freeholder, and when he, afterwards, met him, on his way to jail, he directed the constable to obey the precept, and commit him to prison. Any general presumption of authority in such a case must cease, and we must conclude that the justice acted voluntarily, and took upon himself the capacity, and consequently, the peril of an agent of Chapin. He is, therefore, answerable to the plaintiff. The form of the action is proper. The plaintiff has been falsely imprisoned by the immediate and voluntary act of the justice, and the remedy must be an action of false imprisonment. The court, are, therefore, of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.(c)

him in the issuing of an execution of a different character, but that, in such a case, the magistrate must be regarded as acting officiously and voluntarily and not as the agent of the party. Sutherland, J. observes that "The relation subsisting between a plaintiff and a justice's judgment and the justice himself, is very different from that between client and attorney in courts of record. The attorney is the mere agent of the client. The client is responsible for all the acts of his attorney which affect third persons, whether they were authorized by him or not. He is not, from considerations of public policy, permitted to deny his authority. (*Denton v. Noyes*, 6 John. 206, and the cases there cited. *Id.* 37. 3 Wils. 345. Dougl. 676.)" In *Rogers v. Mulliner*, 6 Wend. 597, 602, the judgment in *Gold v. Bissel* was reviewed by Savage, Ch. J. and also by Bronson, J. *diss.* in *Hoose v. Sherrill*, 16 Wend. 33, 45, but the principle stated by the court in the principal case was in no respect shaken.

(c) In the principal case the plaintiff in the action at the suit of Chapin declared to the justice that he was not a freeholder and had a family in Albany, where he was an inhabitant, which facts were also proved at the trial. This distinguishes it from the case of *Hess v. Morgan*, *infra*, vol. 3, p. 84, where after the judgment was given, the justice asked Hess whether execution should issue, and he answered he cared not how soon it issued, the sooner the better, for he had put his property out of his hands. Nor did he appear

*ALLAIRE *against* OULAND.

[*52]

Where A. directed O., his servant, to enter a certain piece of meadow which he said belonged to him, but which in fact belonged to M., and promised to save O. harmless, the promise was held to be an original undertaking and not necessary to be in writing, and that the act of B. in obeying A's command was lawful and a sufficient consideration for the promise of indemnity. And judgment having been recovered for such entry against O. in an action afterwards brought against A. he alleged in his declaration that he was sued for such entry by M. "by a certain writ commonly called an attachment of privilege against the said O. to answer to the said M. in a plea of trespass upon land &c." This allegation was judged to be impertinent and not necessary to be proved. *Kent, J. diss.*

But if it were necessary to prove it, it was sufficiently established by the record of recovery in the suit against O. *Kent, J. diss.*

Where matter is stated in a declaration which might have been struck out on motion, as surplusage, it need not be proved at the trial.

Where a promise, in one of the counts in a declaration, by reference to the day in the preceding count, was laid after the breach assigned, the mistake was held to be cured by the verdict.

THIS cause came before the court, on a writ of error, from the West Chester common pleas.

The declaration contained four counts. The first count stated that Ouland, (the defendant in error,) on the 10th September, 1796, was a hired servant of Allaire, and retained in his service, and that Allaire was possessed of a certain close of salt meadow, and also of sixty-six rods of meadow, adjoining the meadow of P. J. Munro, in Mamaroneck, and leading from the said close to the highway; that Allaire pointed out a piece of salt meadow, part of the said meadow of the said Munro, as being the said sixty-six rods of meadow

to have stated before the execution was issued that he was not a freeholder and had a family, or claim any exemption from imprisonment. And the justice thereupon without any directions from the plaintiff, who was not present, issued an execution against the body of the defendant, on which he was imprisoned thirty days. It was held that the justice was not liable because the party did not claim his exemption or assert the facts which entitled him thereto.

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belonging to him, the said Allaire, and affirmed it to be the same, and then and there directed the said Ouland to open a fence across the said piece of meadow, so pointed out as the said sixty-six rods of meadow of the said Allaire, and to pass through the same to the highway, and did then and there assume and promise the said Ouland, that if he would open the said fence and pass through the said piece of meadow, so pointed out to him, that he, the said Allaire, would indemnify and save him, the said Ouland, harmless from all suits, &c. that he, Ouland, as the servant of the said Allaire, did, therefore in obedience to the direction and commands of the said Allaire, as his servant, enter on the said piece of meadow, so pointed out to him, and did open the said fence and pass through the said piece of meadow to the public highway, about the business and work of the said Allaire, and he, the said Ouland averred that the said piece of meadow, so pointed out by the said Allaire as the said sixty-six rods belonging to the said Allaire, did not belong to him, but, in fact, was part of the adjoining meadow in the tenure of the said Munro; that, afterwards, to wit, on the 12th September, 1796, the said Munro sued out of the court of common pleas of [53] West Chester county, a certain writ, commonly called an attachment of privilege, against the said Ouland, to answer to the said Munro in a plea of trespass upon land &c. and such proceedings were thereupon had, that the said Munro, afterwards, to wit, in the term of September, 1779, by the judgment of the said court, recovered against the said Ouland, 36 dollars and 87 cents damages, for the said trespass, &c. And that the said trespass for which the said damages were so recovered, was for the same opening of the said fence erected across the said piece of meadow, pointed out to the said Ouland by the said Allaire, as for the said meadow belonging to him, &c. and for passing and repassing through the said piece of meadow, &c. and that, afterwards, a *ca. sa.* was issued on the said judgment, out of the said court of common pleas, against the said Ouland, upon which he was arrested by the sheriff, and detained in his custody twenty-four hours, until he paid and satisfied the

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amount of the said judgment, and the sheriff's fees on the said execution, &c. The second count was like the first stating a recovery against Ouland for a second trespass in a second suit by Munro. In the third count the promise to indemnify was laid to be made "on the day and year last aforesaid." The declaration concluded in the usual form, and the defendant below pleaded *non assumpsit*.

At the trial, in the court below, a bill of exceptions was taken. It was proved, among other things, that Ouland, before he put in bail to the suits of Munro, put in pleas of justification; that after bail was put in, Munro entered a judgment by default, which the court below, afterwards, refused to set aside. The records of recovery in both suits were produced, and the executions, &c. which were satisfied. The defendant below then insisted that the plaintiff below must also produce the writs of attachment of privilege, mentioned in his declaration, which not being done, he moved for a nonsuit, which motion the court below overruled.

The following errors were assigned by the plaintiff in error:

- *1. That the plaintiff below was bound to produce [*54] the writ of attachment of privilege, as alleged in his declaration.
2. That the promise of indemnity ought to have been in writing, it being for the default of another.
3. That the promise was to indemnify for an illegal act, and therefore void.
4. That no contract of indemnity was proved.
5. That Ouland, in the court below, suffered a judgment in the suit by Munro, to pass against him, by default.
6. That the promise was made after the trespass was committed.
7. That the third count in the declaration is bad, because the day on which the promise was laid refers to the day last mentioned in the second count, which was the 6th November, 1797, after the injury or breach is stated to have happened, in September, 1796, and that the verdict being general below, the judgment ought to be reversed.

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Riggs and Woods, for the plaintiff in error.

Harison, for the defendant in error.

RADCLIFF, J. I shall examine the errors assigned, in the order in which they are stated.

1. The rule is, that what may be rejected as surplusage, and which might have been struck out, on motion, need not be proved ; as where the declaration contains impertinent matter, foreign to the cause of action ; but if the very ground of the action be misstated, as if the plaintiff undertake to recite that part of a deed on which the action is founded, and it is misrecited, it will be fatal. (*Bristow v. Wright*, Doug. 642, 643.) In *Savage, qui tam, v. Smith*, (2 Black. Rep. 1101,) it was held, that if a plaintiff set forth a judgment on which a *fi. fa.* issued, although it would have been sufficient to set forth the *fi. fa.* only, he shall be held to prove the judgment, and the difference is there taken, between [*55] immaterial and impertinent averments ; *the former must be proved because relative to the point in question, but the latter need not.

So, in all cases, where the action depends on the proof of a contract, the contract must be proved as laid, for it is the *gist* of the action. (Cowp. 671. 1 Term Rep. 447. 3 Term Rep. 531.) And a trivial variation in setting out a record or any written instrument, as well as a contract, has been held to be fatal. (4 Term Rep. 560, 590, 687.) Yet in the case of *King v. Peppil*, (1 Term Rep. 235,) the word "if," in the declaration, in setting forth a precept, was rejected as surplusage, and the record as produced, without that word, was admitted as sufficient to support the declaration. The cases which have been cited, so far as they relate to a variance between the declaration and the evidence, are not applicable to the present, but they serve to show the principle on which the English courts have proceeded. The question here is, whether the setting out the attachment of privilege is not mere surplusage, and irrelative to the ground of action. If so, then according to the rule as laid down by Lord Mansfield, and Chief Justice De Grey, it need not be proved. That it is irrelative and mere surplusage is, I think, clear. It is

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immaterial to the plaintiff's title to a recovery, whether a writ of attachment of privilege was ever sued out by Munro. It is not the ground of his action. The recovery or judgment against him, and against which the defendant below promised to indemnify him, is the *gravamen* of which he complains. This is sufficiently alleged in the declaration, without reference to the attachment of privilege.(a)

(a) Mr. Gould in his work on pleading has pointed out in clear and definite terms the distinction between impertinent and immaterial averments. "There is an important distinction to be observed between immaterial and impertinent averments: viz. that the former must, in many cases, be precisely proved; whereas the latter require no proof in any case. For the purpose of explaining this distinction, it must be premised that an *impertinent* averment is a statement of matter altogether *foreign* to the merits of the cause, and which might, therefore, be *entirely struck out* without injury to the pleading. An *immaterial* averment (as contra-distinguished from an *impertinent* one) has been variously described; but not always with sufficient precision. In the case of *Bristow v. Wright*, Doug. 665, Lord Mansfield, in commenting upon the distinction between these two species of averments, observes, 'The distinction is between that which may be rejected as *surplusage*, and which might have been *struck out* on motion, and what cannot. Where the declaration contains *impertinent matter*, *foreign* to the cause, and which the master, on a reference to him, would strike out, that will be rejected by the court, and need not be proved. But if the *very ground* of action is mis-stated; as where you undertake to recite that part of a deed, on which an action is founded, and it is *mis-recited*; that will be fatal.' This language, though sufficiently descriptive of an *impertinent* averment, affords rather a particular *example* than a general definition or description of an *immaterial* one. The following is therefore submitted as a substantially correct description of the latter:—An *immaterial* averment is one, alleging, with *needless particularity* or *unnecessary circumstances*, what is material and necessary, and which might properly have been stated *more generally*, and without such circumstances or particulars; or in other words, it is a statement of *unnecessary particulars* in connection with, and as descriptive of *what is material*." Gould's Pl. 160, 161, 162. The author then proceeds to illustrate his observations by an accurate and concise review of *Bristow v. Wright*, after which he further says: "The same rule, in regard to immaterial averments, was recognized in the case of *Savage, q. t. v. Smith*, 2 Bl. Rep. 1101, 1104. This was an action of debt against a bailiff, for extorting illegal fees, on a writ of *feri facias*. The declaration described the *fi. fa.* as having been issued, on a judgment recovered in B. R. at a specified term for £51, 12, 0, debt, and £6, 10, 0, costs. But the plaintiff having failed, on the trial, to prove such a judgment, the court held, that admitting it to have been *unnecessary* for the plaintiff to state any judgment; (id. 1104, and *vid. 5 T.*

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But if it was necessary to have proved that a writ of attachment of privilege did issue, I think it was sufficiently

R. 498,) that is to say, admitting the statement, in that particular, to have been immaterial, yet being made as descriptive of the foundation of the *fi. fa.*, it was necessary to be proved as made." Gould's Pl. 163. "The rule that immaterial averments must be strictly proved, is however by no means universal, though it appears to have been formerly so understood: The principle of the rule manifestly embraces (it is conceived) no other averments of that class than those of which a *variance* may be predicated. And the rule itself is now to be understood as limited by that principle." Id. 164, 165. "The rule then, as limited by the more modern authorities, appears to be, that no immaterial averment requires precise proof, unless the failure of such proof would occasion a *variance* between the pleading and the proof: or, (in different language,) strict proof of such averment is not, at this day, necessary, unless the subject of the averment is a *record*—a *written instrument*—or (as I conceive) an *express contract*. Inasmuch as these are in strictness, the only subject of *variance* (properly so called) when the mistake in the pleading is in a point *not in itself material*." Id. 164. In Cowen & Hill's Notes to 1 Phill. Ev. 503, note 398, to p. 206, it is observed that, "The decisions relating to the subject of the foregoing extract, both American and English, will be found to exhibit considerable want of uniformity; and this has probably arisen in some measure, from not attending to the reason of the distinction taken in *Bristow v. Wright*, and *Williams v. Allison*, cited in the text." See the cases cited id. notes 401 and 407. "Where the plaintiff declared upon a special contract, alleging that he was indebted to the defendant's testator in a certain sum secured to the testator by bond and mortgage executed by *the plaintiff*; and that it was agreed the plaintiff should convey the mortgaged premises to the testator—the latter to discharge the plaintiff from his indebtedness, sell the premises, and after deducting the amount due him, pay the surplus to the plaintiff, and on the trial, it turned out that the bond and mortgage were executed by the plaintiff and another; the court, in relation to the *variance*, adopted the rule as stated by Mr. Chitty, 1 Chitty's Pl. 295, that every allegation in an inducement which is material, and not impertinent or foreign to the cause, and which cannot be rejected as surplusage, must be proved as alleged. And it is added: 'this is particularly true in setting forth written instruments. As this count is framed, the allegation which respects the existence and cancelling the mortgage, cannot be stricken out as surplusage; and if not, it should have been truly stated.' *Hess v. Fox*, 10 Wend. 436, 437. It has been held, that in an action on a bill or note payable at a particular time and place, if the plaintiff aver specifically that a demand was made at the time and place, he will be bound to prove it. *Conn's adm'r v. Gano's ex'r*, 1 Hamm. Rep. 483. The court concede that it is wholly unnecessary to make this averment; but they say, 'being made it must be proved; in an action against the drawer or endorser of a bill, it is not necessary to state that the drawee accepted it; but

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proved by the record which was given in evidence. It is stated that P. J. Munro, the plaintiff in the suit against Ouland, sued as one of the attorneys of the court, according to the privileges of such attorneys, used and approved, &c. This may be received as sufficient evidence of the writ of attachment of privilege, on the same principle, that Holt, Ch. J. in the case of *Crawley v. Blewett*, 12 Mod. 127,

Chitty says, if it be stated, it must in an action against the drawer, be proved ;" and they cite Chitty on Bills, 459. Pease, J. dissenting in the above case states his views as follows: 'The true distinction between an immaterial averment, which it is necessary to prove, and one which it is not, I consider to be this: when the plaintiff avers in his declaration a fact, the converse of which being pleaded or proved by the defendant, would be a defence to the action, then the averment ought to be proved. But if the fact averred, be every way immaterial—if it form no part of the plaintiff's right to recover, and if the converse would constitute no defence to the action, then it would not be only useless to prove it, but would be an unnecessary waste of time and money, and a trifling with the administration of justice.' This test is perhaps a true one in the main, but admits of qualification. Instances are of frequent occurrence, where, through the inadvertence of the pleader, an averment has been made of unnecessary particulars, in 'connection with and as descriptive of what is material,' and where a failure to prove such particulars resulted fatally. And yet, it would be hard to perceive how those particulars can be said to form an essential part of the plaintiff's right to recover; or the converse of them to constitute a defence. Where a declaration on a bill of exchange, by the endorsees against the acceptor, alleged that it was endorsed to the plaintiffs, as surviving assignees of A. B., after his bankruptcy; it was held that the plaintiffs were bound to establish both points; viz. that the bill was endorsed after the bankruptcy of A. B., and to the plaintiffs as surviving assignees, &c.; though if the declaration had been general, in the names of the plaintiffs, 'the possession of the bills by them would have done.' *Bernasconi v. The Duke of Argyle*, 3 Carr. & Payne, 29." According to this distinction the omission to prove circumstances alleged not essential to the claim or charge, and which might have been wholly omitted, is not material, provided the circumstances so alleged do not operate by way of description of others which are essential. See 4 Stark. Ev. 1534. *Utile per inutile non vitiatur*. (3 Rep. 10.) Bro. Max. 82, 83. The collection of cases upon this subject is far too large to be cited in this note. The most important may be found in 1 Phil. Ev. Cow. & Hill's ed., p. 206, *et seq.* Cow. & Hill's Notes to 1 Phil. Ev. 503, *et seq.* 3 U. S. Digest, by Curtis, tit. Pleading, II. c. pl. 225, 229, tit. Pleading, II. d. 1 Smith Lead. Cas. 329, note to *Bristow v. Wright*, and see also the note to Hare & Wallace's ed. 1 Greenleaf Ev. 59, 65, 67, 68, 69, 71, 76. 3 Stark. Ev. 1525, *et seq.* 1 Chit. Pl. 5th Am. ed. 208, *et seq.* and cases cited in the notes.

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[*56] *admitted the plea-roll to be sufficient proof of the bill, where the party was alleged to have been impleaded by bill.

2. The promise was not to indemnify for the default of another ; but was made to the plaintiff himself, for an act to be done by him, as the servant of the defendant below. It was an original undertaking, and not a collateral promise.

3. The plaintiff was the servant of the defendant, and obliged to obey his lawful commands, and he commanded the plaintiff to enter into the *locus in quo*, claiming and declaring it to be his own. If this had been true, the entry would have been lawful. The plaintiff relying on the truth of the declaration of the defendant, did enter. The act on his part, was, therefore, lawful, and a good consideration for the promise. (a)

(a) In the case of *Coventry v. Barton*, 17 Johns. R. 142, it was held that if a consideration be illegal, it will not support an *assumpsit*. As if one request or direct another to do an act which he knows, at the time, will be a *trespass*, and promise to indemnify him, the promise is void ; but if the party who does the act at the instance or by the command of another does not know, at the time, that he is committing a *trespass*, the promise to indemnify is valid. As, where the plaintiff, being ordered out by the *overseer* of highways of work on a certain road, was ordered by the *overseer* of the highways, and by the direction, also, of the *commissioner* of highways, to pull down and remove a turnpike gate and fence, erected at the intersection of the road, on which the parties were working, with a turnpike road, supposing it to be a nuisance, and the plaintiff, accordingly, removed the gate and fence, on the promise of the *overseer* to indemnify him ; this was held to be a valid promise, on which the plaintiff might maintain an action to recover of the defendant an indemnity, for what he had been compelled to pay on a judgment in an action of *trespass* recovered against him, by the turnpike company whose gate had been so removed. And in *Stone v. Hooker*, 9 Cowen, 154, it was held that a promise to indemnify one against a *trespass* includes an authority to the promisee to employ and indemnify agents ; and if he is compelled to pay such agents damages recovered against them for the *trespass*, he may recover over against his promisor, the same as for damages paid by the promisee directly, to the person trespassed upon ; and, where such agents were severally sued by the person trespassed upon, the original promisor having notice, one of them after trial and recovery against another, gave a *cognovit* in his own suit, and paid, and his promisor paid him ; held, the agent appearing to have acted in good faith, that the original promisee might recover the amount of what he thus paid.

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4. There is no ground for the fourth error alleged, for the contract of indemnity was sufficiently proved by the testimony of two witnesses.

5. The defendant below had notice of the suits brought against the plaintiff by Munro, for when the plaintiff was arrested, he informed the defendant of it, who promised to enter bail for him, and acknowledged his promise to defend the suits, and save the plaintiff harmless. The judgments by default were obtained, in consequence of the refusal of Allaire to put in bail for Ouland, in due season. Under these circumstances, I think the defendant in error did all that could be required of him, as to the defence of the suits, and that it was incumbent on the plaintiff in error to make the defence, if any was necessary. (b)

6. The sixth error alleged is not supported by the fact, as appears from the bill of exceptions.

7. Any inconsistency as to the dates, is now immaterial, The promise has been proved, according to the truth, to be prior to the time the breach is stated; besides, the defect is cured by the verdict. (c) I am, therefore of opinion, that the judgment ought to be affirmed.

*LANSING, Ch. J., LEWIS, J. and BENSON, J. were [*57] of the same opinion.

KENT, J. *dissented*. He observed, that there was a valid cause of error assigned, to wit, that the attachment of privilege mentioned in the declaration was not produced at the trial; that as the plaintiff below had thought proper to set it forth specially, he was bound to produce it. This was *immaterial* matter, which must be proved. The distinction between matter *impertinent*, and matter *immaterial*, was well defined and settled, and the rule requiring the latter to be proved, was intended to inculcate the necessity of precision and brevity in pleading, and to serve as a rod over the

(b) *Stone v. Hooker*, cited *supra*, n. a. *Trustees of Newburgh v. Galatian*, 4 Cowen, 340. *Mott v. Hicks*, 1 id. 513. *Hale v. Andrus*, 5 id. 225. A special count on a promise to indemnify must allege the plaintiff damaged. *Farnsworth v. Nason*, Bray, 194. *Hide v. Childs*, 1 Chip. 230.

(c) See 1 Saund. 238, n. 1.

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counsel who should incumber the record. (*Savage v. Smith*, 2 Black. Rep. 1101. *Bristow v. Wright and Pugh*, Doug. 665; and *Neding v. Pippel*, 1 Term Rep. 235.) The rule extended to all cases of records and written contracts. The attachment of privilege was here connected with the cause of action, and it was therefore not impertinent, but immaterial matter, and it was not sufficiently shown by the record of the judgment, produced upon the trial, because nothing in the record necessarily implied that that species of process had been issued. For this cause, therefore, and without examining the other causes of error, he was of opinion that the judgment below ought to be reversed.

Judgment affirmed.

 [*58]

 *WHITAKER *against* CONE.

Buying and selling lands out of the possession of the vendor, and held adversely at the time, is buying and selling a pretended title, and is not a valid consideration for a promise. It is a species of maintenance and void on general principles of law and public policy.

A sale by one state of lands within the jurisdiction and under the adverse claim of another state, must be judged by the same principles of law as a sale by an individual.

Therefore where notes were given for the purchase money, on a contract for the purchase and sale of Susquehannah lands, within the jurisdiction of Pennsylvania, under the Connecticut claim to those lands; it was held that the sale was illegal, and the consideration void.

THIS was an action of *assumpsit*. The plaintiff declared on two promissory notes made by the defendant to him, for 135 dollars and 61 cents each, dated the 9th February, 1796, one payable in cattle, and the other in money, the 1st September, 1798. The declaration also contained the money counts. The defendant pleaded *non assumpsit* to the 2d, 3d and 4th counts, and as to 135 dollars and 61 cents, in the first count, that he did not assume, &c. and payment as to the residue. A notice was subjoined to the plea, according to the statute, that the notes in question were given without

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consideration, and were obtained by fraud and imposition, having been given on the sale by the plaintiff to the defendant, through the agency of one Hunt, of Susquehannah lands, to which neither the plaintiff nor Hunt had any title. The cause was tried before Mr. Justice *Benson*, at the Columbia circuit, in October, 1799.

It appeared at the trial, that the lands in question, were certain lands in the state of Pennsylvania, claimed by the state of Connecticut, called Connecticut Susquehannah lands. The plaintiff had by contract sold to Hunt a township of the said lands, and while Hunt was in treaty with the defendant and some others, for the sale of the same lands to them, it was suggested that the plaintiff could not fulfil his contract with Hunt, on account of doubts as to the validity of the Connecticut title; and the plaintiff, who was present, said he had no doubt the Pennsylvania title might be purchased for a trifle; that he had lately received information from the Susquehannah, of certain papers which had come to light, very favorable to the Connecticut title; and the defendant and the others, encouraged and induced by the plaintiff, made the contract with Hunt for the purchase of the land, at 2s. 4d. Connecticut currency, per acre. The defendant and the others, took up the notes given by Hunt [*59] to the plaintiff, and gave their own notes to the plaintiff, for the amount.

The lands were proved to be situated within the jurisdiction of the state of Pennsylvania; and upon the evidence, the judge was of opinion, that the defendant had sufficiently shown a want of consideration. The plaintiff then offered to prove, that the lands in question were vacant and unsettled, at the time they were sold by Hunt, and that the lands contiguous were principally settled by persons under the Connecticut title, and that many of these settlements were made previous to the determination of the question of jurisdiction between Pennsylvania and Connecticut, but the judge rejected the evidence as improper. The plaintiff submitted to a nonsuit, with liberty to move the court to set it aside, and for a new trial.

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A motion was made to set aside the nonsuit, and for a new trial, which was argued by *W. W. Van Ness*, for the plaintiff, and *E. Williams*, for the defendant.

Per Curiam. This case comes within the principle laid down in the case of *Woodworth v. Dole* and others, decided in the court for the correction of errors, in March last. (a) Buying and selling of lands out of the possession of the vendor, and held adversely at the time, is buying and selling a pretended title, and is not a valid consideration for a promise. It is a species of maintenance, and void on general principles of law and public policy. A sale by one state, of lands within the jurisdiction and under the adverse claim of another state, must be judged by the same principles of law, as a sale by an individual, since the several states, in respect to their territorial claims, have submitted themselves to the cognizance of the judiciary of the United States.

Though the sale was, *formally*, made by Hunt to the defendant, yet the plaintiff was privy thereto, and instrumental "in effecting it, and he had previously conveyed the same lands, under the same title, to Hunt, whose notes he held for the purchase money, and which were delivered up, in exchange for the present notes. If Hunt was not merely the agent of the plaintiff, in this transaction, yet the plaintiff received the notes, for the like consideration, and with full notice of all the circumstances; he is, therefore, to be affected by the objection against the legality of the consideration. The court are therefore of opinion, that the motion ought to be denied.

LEWIS, *J. dissented.*

LANSING, Ch. J. not having heard the argument of the cause, gave no opinion.

Motion denied. (b)

(a) See *infra*, p. 417.

(b) By the statute 32 Hen. VIII. c. 9, "No one shall buy or sell any pretended right or title to land, unless the vendor hath been in possession of the same or the reversion or remainder thereof, or taken the rents or profits thereof for one whole year, before such grant, on pain that both purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor." By

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the 2 Revised Statutes, 576, § 6, 2d ed., it is provided that, "No person shall buy or sell, or in any manner procure, or make or take any promise or covenant to convey, any pretended right or title to any lands or tenements, unless the grantor thereof, or the person making such promise or covenant, shall have been in possession, or he and those by whom he claims shall have been in possession of the same, or of the reversion or remainder thereof, or have taken the rents and profits thereof, for the space of one year before such grant, conveyance, sale, promise or covenant made; and every person violating this provision, shall be deemed guilty of a misdemeanor." This statute however, does not apply to any mortgage executed by a person not in possession of lands to which he has a just title, but of which there shall be an adverse possession, nor to any conveyance of lands, &c., to any person in the lawful possession thereof. *Id.* § 7; see also, 1 *id.* p. 732, § 148. "The rule of law against the sale of pretended titles may be considered as for the most part adopted into American jurisprudence, and is generally affirmed by express statute; but in some of the states it has been modified or abolished. The common law rule has been recognized in Massachusetts and Indiana. In Massachusetts, there is no statute on the subject; but the act has always been unlawful. It is doubtful, whether the statutory penalty is incurred; but it may be punished by fine and imprisonment. In Maine, where one has the right of entry, though disseised, his conveyance is good. *Fite v. Doe*, 1 Ind. 127; *Brinley v. Whiting*, 5 Pick. 356; Me. Rev. St. 371. In Connecticut, the seller and buyer forfeit, each one-half the value of the land. *Conn. St.; Hinman v. Hinman*, 4 Conn. R. 575; *Hyde v. Morgan*, 14 Conn. R. 184. But in Pennsylvania, though not expressly abrogated, the rule is held not to be in force. *Cresson v. Miller*, 2 Watts, 272. So, in New Hampshire, it is no offence to purchase lands held adversely, and it is the general impression that such purchase is not invalid in law. *Haddock v. Wilmarth*, 5 N. H. 181. In South Carolina and North Carolina, a purchase of, or contract for, the title to real estate is forbid, unless the seller or those under whom he claims have been in possession, or had the reversion, or the rents and profits, a whole year previously. The seller forfeits the land, and the buyer its value. But one in possession may purchase a pretended title. 1 *Brev. Dig.* 101, 102; 1 N. C. Rev. St. 260; *Hoppiss v. Eskridge*, 2 Ired. Eq. 54. In Kentucky, by an act of 1824, a conveyance of, or contract for, land held adversely, is void, and the vendor retains his title. *Wash v. McBrayer*, 1 Dana, 566, 2, 68. In Kentucky and Tennessee, there must be an *adverse possession*, and, if the seller be a non-resident, such possession must be by deed, devise, or inheritance. The prohibition does not apply to conveyance in fulfilment of a *bona fide* contract, made prior to any adverse possession. *Ten. St.* 1821, 72; *Sims v. Cross*, 10 Yerg. 460; *Cardwell v. Sprigg*, 1 B. Monr. 370. In Ohio, it seems, there is no law against champerty and maintenance. But the purchase of land, from one against whom a suit is pending for it, is void, except against himself, if he prevails. A release passes the title, notwithstanding an adverse possession. *Walk. Intro.* 297, 351, 352; *Hall v. Ashby*, 9 Ohio, 96. In Arkansas, Illinois and Missouri, a deed is valid, though there be an adverse possession. *Illin. Rev. L.* 130; *Misso. St.* 119; *Ark. Rev. St.* 189."

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2 Hilliard Abr. 2d ed. 414, 415. Wherever then the statute of 32 Hen. VIII. c. 9, has been re-enacted, or its provisions are recognized as a part of the common law, any agreement of which the consideration is the sale of lands held adversely by a third person must be void. *Belding v. Pitkin*, 2 Caines, 147; *Swett v. Poor*, 11 Mass. R. 549; *Everenden v. Beaumont*, 7 id. 78; *Brinley v. Whiting*, 5 Pick. 354.

To constitute the offence within the statute, five things appear to be necessary:

1. The estate sold or purchased should be a legal as contradistinguished from an equitable estate. *Wood v. Griffith*, 1 Swanst. 43, 55, 56; *Allen v. Smith*, 1 Leigh. R. 231.

2. The purchase should be made from some person other than the state. *Jackson v. Gumaer*, 2 Cowen, 552.

3. The sale should not be judicial. *Tuttle v. Jackson*, 6 Wend. 224; *Saunders v. Groves*, 2 J. J. Marsh. 407. (Query, whether the statute applies to sheriffs' deeds. *Jackson v. Anderson*, 4 Wend. 474.)

4. The land should be held adversely. *Preston, qui tam, &c. v. Hunt*, 7 Wend. 53; *Swett v. Poor*, *ut sup.*; *Everenden v. Beaumont*, *id.*; *Brinley v. Whiting*, *id.*; *Walcot v. Knight*, 6 Mass. R. 421. As to what constitutes such adverse holding, it seems to be the rule that there must be in all cases a claim and color of title; *Humbert v. Trinity Church*, 24 Wend. 587; *Jackson ex dem. Dunbar v. Todd*, 2 Cai. R. 183; *Jackson ex dem. Young v. Ellis*, 13 J. R. 118; *Smith ex dem. Teller v. Burtis*, 9 J. R. 174; *Jackson ex dem. Roosevelt v. Wheat*, 18 J. R. 40; *Jackson ex dem. Vanderlyn v. Newton*, 18 J. R. 355; *La Frombois v. Jackson ex dem. Smith*, 8 Cow. 589; *Jackson ex dem. Ten Eyck v. Frost*, 5 Cow. 346; made in good faith with reliance thereupon, and in the belief that the land is the property of the claimant; *Livingston v. Peru Iron Co.* 9 Wend. 511; *Jackson v. Halstead*, 5 Cow. 216; and held by him exclusive of the rights of all others; *Humbert v. Trinity Church*, 24 Wend. 587; *Smith ex dem. Teller v. Burtis*, 9 J. R. 174; *Jackson ex dem. Roosevelt v. Wheat*, 18 J. R. 40; *Jackson ex dem. Vanderlyn v. Newton*, 18 J. R. 355; though it is of course not necessary that such title should be legal and valid; *Jackson ex dem. Dunbar v. Todd*, 2 Cai. R. 183; *Jackson ex dem. Young v. Ellis*, 13 J. R. 118; *Jackson ex dem. Gilliland v. Woodruff*, 2 Cow. 276; *Jackson ex dem. Young v. Camp*, 1 Cow. 605; *La Frombois v. Jackson ex dem. Smith*, 8 Cow. 589; *Clapp v. Bromagham*, 9 Cow. 530. If there be no deed as evidence of the claim then there must be a *pedis possessio*—an actual occupancy—a substantial enclosure of the premises; *Jackson ex dem. Gee v. Olitz*, 8 Wend. 440, 441; *Jackson v. Schoonmaker*, 2 Johns. R. 34; *Livingston v. Peru Iron Co. ut sup.*; *Humbert v. Trinity Church, ut sup.*; for every constructive adverse possession must be founded on a deed or paper title; *Simpson v. Downing*, 23 Wend. 316; *Jackson ex dem. Gilliland v. Woodruff*, 1 Cow. 276; *Jackson ex dem. Young v. Camp*, 1 Cow. 605; *La Frombois v. Jackson ex dem. Smith*, 8 Cow. 589; *Jackson ex dem. Putnam v. Bowen*, 1 Cai. R. 358; *Jackson ex dem. Bristol v. Elston*, 12 J. R. 452. See also, *Jackson ex dem. Ten Eyck v. Richards*, 6 Cow. 617; *Jackson ex dem. Hasbrouck v. Vermilyea*, 6 Cow. 677; *Jackson ex dem. Gee v. Olitz*, 8 Wend. 440. If however the party claim under a deed,

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the actual occupancy of part of the premises claimed, is sufficient ; unless indeed the paper title include a large patent or tract much more than can be necessary for the purposes of cultivation. Per Savage, Ch. J. in *Jackson v. Oltz* *ut sup.* ; *Jackson v. Woodruff*, 1 Cow. 276. See *Jackson v. Camp*, *id.* 605, 609. The books abound with illustrations of adverse possession, both actual and constructive, it is therefore deemed unnecessary to supply any here. An excellent mode of discriminating whether possession is adverse, is laid down by Mr. Chitty, (Gen. Prac. vol. 1, p. 748, *et seq.*) who observes that "there are four general rules when it is not so, viz. *first*, when both the parties claim under the *same* title ; *secondly*, when the possession of the one party is *consistent* with the title of the other ; *thirdly*, when the claimant or his successor has never, in contemplation of law, been out of possession ; and *fourthly*, when the occupier has acknowledged the claimant's title." A large number of cases are presented under each rule to which the reader is respectfully referred.

5. The party charged with the offence should have knowledge of such adverse holding. *Preston qui tam, &c. v. Hunt*, 7 Wend. 53 ; *Swett v. Poor*, *ut supra* ; *Eberenden v. Beaumont*, *id.* ; *Brinley v. Whiting*, *id.* ; *Walcot v. Knight*, 6 Mass. R. 421 ; *Lane v. Shears*, 1 Wend. 433, 437. Thus in *Teel v. Fonda*, 7 Johns 251, which was the case of a *purchaser*, the court say the evidence is full and complete, that when the defendant purchased the lot, it was claimed and possessed under a hostile title, and all this was known to the defendant at the time of his purchase. And in *Hassenfrate v. Kelly*, 13 *id.* 466, 468, which was the case of a *vendor*, the court say : "The statute intended to punish persons for selling pretended rights to land, for the purpose of maintenance, and when it is evident that such intention did not exist, there can be no offence. A contrary argument may be derived from the statute, which subjects the taker, or buyer, to the same penalty as the seller, if he knew the sale to have been made against the provisions of the act, indicating, that if the taker, or buyer, did not know it, he should not incur the penalty ; and as the statute is silent as to the knowledge or ignorance of the seller, it may be inferred, that the legislature intended to punish him, without regard to that fact, on the ground that he is chargeable with the knowledge of the state and circumstances of his own lands. It would be the legal intendment, undoubtedly, that every man knew the situation of his real property ; but if he could show that he did not know it, it would be very unreasonable to subject him to a penalty, for an offence perfectly unintentional. The deed, under such circumstances, would be void and inoperative, and there is no good reason why an innocent person, unconscious of offence, should be punished beyond that. In the case of *Partridge v. Strange & Croker*, (1 Plowd. 80, 88 ; 1 Dyer. 746,) an exception was taken to the declaration, that there was no averment that the bargain and sale was for maintenance, and the court held it to be a good exception, and that the plaintiff had not shown the case to be within the danger of the statute, saying, that was the point of the statute." In the case of *Etheredge v. Cromwell*, 8 Wend. 629, this doctrine was applied under peculiar circumstances. The vendor, when he conveyed, knew that he had no title, but the jury negatived his knowledge of an adverse hold-

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ing, and the court held principally upon the authority of *Haseenfrats, qui tam, v. Kelly*, cited *supra*, that such knowledge was necessary to complete the statutory offence. Sutherland, J. delivering the opinion of the court says: "Where the action is against the *grantee* of a pretended title, the jury must find that the grantee knew the title was pretended. 1 Leon. 166, 167. I am not prepared to say, that according to the English authorities, the grantor of a pretended title to land *must know that it is held adversely*, in order to subject him to the penalty of the statute; but the policy of the statute was founded upon a state of society which does not exist in this country, and it is perhaps indispensable that such a construction should be given to it here as is adapted to the peculiar state of our uncultivated lands. 4 Kent's Comm. 438. 3 Cowen, 643, 4, 5. As it respects the actual owner of lands, who conveys them in good faith without knowing that they are occupied, it would be most oppressive and unjust to subject him to the penalties of the statute; and the statute makes no discrimination between a conveyance made by one who supposes he has a right to convey, and a conveyance where the grantor knew he had no title. I am inclined, therefore, to say that the penalty shall not attach in any case, if the grantor can show that he was ignorant at the time of his conveyance that the lands were claimed or held adversely." If the offence be in other respects complete, it is immaterial whether the right or title purchased or sold be good or bad; for if it be ever so good, if the vendor be not in possession nothing passes by the deed, and the case comes within the statute. *Tomb, qui tam, &c. v. Sherwood*, 13 Johns. R. 288.

 JONES against HAKE.

A. made a note payable to B. which was indorsed by him, and C. and D. and sent by A. to E. a money broker, in order to raise money, and E. advanced the money on the note, deducting a premium of two per cent., a month. In an action brought against B. the first indorser, by G. it was held that the note was usurious and void.

Also, that E. the broker, was an admissible witness on the part of the plaintiff, to prove that the note had been sold for no more than the legal interest to F.

THIS was an action of *assumpsit*, on a promissory note drawn by Charles Watkins in favor of the defendant, indorsed by him, Barber and Griffin, and Peter A. Schenck, and which note, afterwards, came into the hands of the plaintiff.

The cause was tried at the last sittings in New York, be-

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fore the Chief Justice. The defence set up was, that the note was usurious, and therefore void.

It was proved by a witness for the defendant, that Watkins, the maker of the note, in order to raise money, sent it *to one Haskin, a money broker, who had often [*61] obtained money for him before.

When the witness first took the note to Haskin, it had not been indorsed by Peter A. Schenck. Haskin kept it a few days, and then returned it to the witness, telling him that he could not get the money on the note as it then was, but that if Watkins would procure the endorsement of Peter A. Schenck, he (Haskin) could get him the money, at the rate of two per cent. per month. The name of Schenck was obtained, and the note again taken to Haskin, who then advanced a part of the money, and, shortly afterwards, the residue, deducting at and after the rate of two per cent. per month, as the interest thereof. It further appeared in evidence, that at the time of delivering the note to Haskin, the witness knew not whether Haskin was the owner of the money, or acted as an agent for another, but he knew no other person as the lender of the money. The terms were adjusted solely with Haskin.

The counsel for the plaintiff offered Haskin as a witness, to prove that he, as the broker of Watkins, had sold the note in question to one Herriman, at a discount, not exceeding legal interest; and also offered Herriman, who had no interest in the note, and was released by the plaintiff, to prove that he had given a full consideration for it; but they were both rejected by the judge.

The counsel for the plaintiff contended, that as Haskin was proved to be a money broker, the jury might consider him as the broker of Watkins, for the purpose of selling the note, and that at any rate it was a sale of a note, and not a usurious contract.

But the judge charged the jury, that under the evidence before them, they must consider it as a loan, and Haskin as the principal; that the terms of the loan were made by him, and he only was known as the lender; that as more than

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seven per cent. per annum had been taken, the note was void, and they must find for the defendant.

The jury, nevertheless, found a verdict for the plaintiff. for the full amount of the note, with interest.

[*62] *A motion was made to set aside the verdict, and for a new trial.

B. Livingston, for the plaintiff.

Riker, for the defendant.

RADCLIFF, J. Considering this case as depending upon the testimony admitted at the trial, I am of opinion that the verdict was clearly against evidence. The note in question was made by Watkins, and indorsed by the persons whose names appear on it, for the accommodation of Watkins alone. No money was paid, or value given, by any of the indorsers. If the transaction be viewed in its true light, it was a contract, made through the agency of Haskin, between Watkins on the one part, and the person who loaned the money, and took the note as his security, on the other. The lender was in reality, the first holder of the note, for the value given, whatever that may have been. If then we admit no shift or device to evade the statute against usury, and look through the forms under which the parties intended to cover the loan, it appears to me there can be no doubt but that the contract was usurious, and the note therefore void.(a)

As to the witnesses offered by the plaintiff, I think they were competent, and ought to have been admitted. Haskins was the mere agent or broker,(b) and not a party in interest,

(a) See *Wilkie v. Roosevelt*, *infra*, vol. 3, p. 66, n.

(b) In the case of *Payne v. Trescott*, 2 Bay, 23, a broker who had negotiated usurious paper between the borrower and lender was held to be a competent witness to prove the nature of the transaction, although he was payer of the notes and had endorsed them in order to give them circulation. That agents, attorneys and servants are generally competent witnesses, *ex necessitate*, see *supra*, vol. 1, p. 274, n. a, to *Cortes v. Billings*, and add to the authorities there cited *Dudley v. Bolles*, 24 Wend. 465. *Barnes v. Cole*, 21 id. 188. *Vanderburgh v. Hull*, 20 id. 70. *Noble v. Paddock*, 19 id. 456. *Morris v. Wadsworth*, 17 id. 103. *Sewell v. Fitch*, 8 Cowen, 215. *Mauran v. Lamb*, 7 id. 174. *Nildeberger v. Baldwin*, 2 Hall, 176. *Rankin v. Am. Ins. Co.*, 1 id. 619. *Milward v. Hallett*, 2 Caines, 77. *Smith v. Huntington*, 1 Root, 226. *Shepard v. Palmer*, 6 Conn. R. 95. *Conner v. Moore*, 5 J. J.

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and Herriman is expressly stated not to have any interest in the note, and was also released by the plaintiff. These witnesses were offered to disprove the usury, and were objected to by the defendant, and rejected by the judge. It has been pretended, that the objection *coming from the defendant*, ought to conclude him as to the facts offered to be proved. But this idea is altogether incorrect. A party has a right to avail himself of any objection to the competency of a witness, and if overruled, he has still an undoubted right to discredit his testimony, or oppose it by counter proof.

"It has also been urged, that the plaintiff is in possession of an equitable verdict; that the defence set up by the defendant, being founded on usury, is unconscientious, and that the court ought not to interfere to relieve him from a just debt. There are cases in which these considerations, if true, would have their weight, but whatever opinion may be entertained as to the morality of such a contract, I think we are bound by the statute to consider it as illegal and corrupt. To treat it differently, would contravene the declared sense of the legislature, and tend to defeat the operation of an important act, founded on considerations of public policy. Upon the whole, I am of opinion that the case ought to be re-examined on all the proofs, and for that purpose that a new trial should be awarded.

KENT, J. and BENSON, J. concurred.

LANSING, Ch. J. I do not differ from the opinion of the court, that Haskin is to be considered as the agent of Watkins, and of consequence that my exclusion of his testimony was improper. But I cannot concur in the effects ascribed to that opinion.

If Haskin was the agent of Watkins, and he passed the note as such, the acts of Haskin must be considered as those

Marsh. 665. *Connelly v. Childs*, 2 A. K. Marsh. 242. *Alexander v. Emerson*, 2 Litt. 25. *Swearingen v. Fields*, 1 Dana, 387. *Folly v. Smith*, 7 Halst. 139. *Ayres v. Van Lien*, 2 South. 765. *McLean v. Batchelor*, 8 Greenl. 324. *Phelps v. Sinclair*, 2 N. Hamp. 554. *Rice v. Grove*, 22 Pick. 158. *Fuller v. Wheelock*, 10 id. 135. *Ruan v. Gardiner*, 1 Wash. C. C. R. 145.

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of his principal, and certainly, if he stands in that relation *only*, there is no proof of usury. The secret transactions between a principal and his agent, cannot influence the contract which he makes, for the benefit of his principal, with others.

Haskin and Herriman were offered as witnesses on the part of the plaintiff, to vindicate his contract from the imputation of being usurious.

If this evidence had been admitted, it could not place the defendant in a better situation. It cannot therefore be necessary, on the ground assumed by the court, to turn the plaintiff over to a new trial; for if there is now no proof of [*64] usury, the testimony of Haskin *and Herriman, as stated in the case, though it may tend to destroy suspicion, can never establish any fact material to the parties.

I am, therefore, of opinion that the motion ought to be denied.

LEWIS, J. was of the same opinion.

New trial granted.

 JACKSON, *ex dem.* SALISBURY and others, *against* HUYCK.

The south bounds of Coeyman's patent, are to be taken according to the survey made by order of the proprietors in 1749.

THIS was action of ejectment. The cause was tried at the Albany sittings, in April, 1800, and a verdict taken for the plaintiff, by consent, subject to the opinion of the court, on the following case:

The plaintiff claimed under a patent to Salisbury and others, dated the 20th of April, 1749, and the defendant under a patent to Coeyman, dated the 26th of August, 1714, the *south* boundary of which is described as "beginning at the mouth of Peter Bronck his creek, and thence up the same until it comes to Coxsackie, and thence up into the woods by a *due west* course, until it is twelve English miles dis-

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tant from the mouth of the said creek." In 1749, the proprietors of the patent to Coeyman employed a surveyor to survey their south boundary, who judging that the course was to be a *natural* west course, or a line proceeding west, at right angles from the meridian, assumed the boundary conformably thereto, and run a *magnetic* west nine degrees north, which he calculated at that time would give a *natural* west course, and marked the trees in the line throughout, and it then became the *reputed* south boundary. The north boundary of the patent to Salisbury appears to have been intended to be the same line; and the north "boundaries of two tracts, in a patent to Scott [65] and others, of the 1st of January, 1770, are expressly bounded on it, where it is described "as an old line of trees, marked as the south bounds of the lands granted to Coeyman." It was admitted that if this line is still to be adhered to, as the south boundary of that patent, then the premises in question will be included in the patent to Salisbury, which will then, as will also the two tracts granted to Scott and others, have the due quantity of land, and the plaintiff will be entitled to recover; but if it is departed from, and the *magnetic* west, as it was in 1714, the time of the patent, is to be taken instead thereof, then the premises in question will be excluded from the patent to Salisbury and others; and that patent, and the two tracts granted to Scott and others, will prove deficient, and the plaintiff cannot recover.

Spencer, for the plaintiff.

Yates and Van Vechten, for the defendant.

LANSING, Ch. J. delivered the opinion of the court. This cause is brought before the court on a case reserved. It depends upon the construction of the south bounds of Coeyman's patent, which is described as running *due west* from the mouth of Coxsackie creek.

It appears the proprietors of the patent of Coeyman directed a survey of it in the year 1749; that it was made with an allowance of variation of nine degrees, and trees marked correspondent to the line run, and that from thence it became the reputed south line of Coeyman's patent. How this re-

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putation was acquired, and under what other circumstances, does not appear.

It further appears from the case, that the patent under which the lessors claim, is bounded by the south line of Coeyman's patent; that another patent, in 1770, expressly recognized the line run as run for the south line of [*66] Coeyman's *patent, thus combining the assent of government with the location made by the proprietor.

After a lapse of half a century, it would be injurious to the peace of the community to suffer a boundary, so settled, by the express assent of the parties interested in correcting any mistake in the survey, to be disturbed.

The court are, therefore, of opinion, that the defendant must take nothing by his motion.

Rule refused.

 STAFFORD *against* VAN ZANDT.

Where a cause in the common pleas had been referred, and a judgment was entered for ninety-nine cents more than the sum reported by the referees to be due, the judgment, on a writ of error, was reversed.

THIS cause came before the court, on a writ of error, from the Mayor's Court of Albany.

By the record it appeared, that the action in the court below had been referred to referees, who had reported a sum due to the plaintiff below, who is the defendant here, and that the judgment in the court below, was given for ninety-nine cents more than the amount reported to be due by the referees. This was assigned for error, with several other matters, which were not particularly noticed by the court.

Emott, for the plaintiff.

Ten Broeck, for the defendant.

Per Curiam. The variance between the sum reported by the referees and the amount of the judgment, is a fatal error.

 Jackson v. Powell.

Without expressing an opinion on the other points, let the judgment for this cause be reversed.

Judgment reversed.(a)

*JACKSON, *ex dem.* LEWIS AND ELY, *against* [67]
POWELL.

Where there were two plaintiffs in a cause, one of whom resided out of the state, and the other within the state, and the plaintiff within the state, died pending the suit, and the defendant obtained judgment, it was held that the attorney of the plaintiff was not bound to pay the costs.

A JUDGMENT having been rendered for the plaintiff in this cause,

L. Elmendorf, at the last term, obtained a rule on *Bowman*, attorney for the plaintiff, to show cause why he should not be ordered to pay the costs, which were taxed, on the ground that one of the lessors of the plaintiff was dead, and the other resided out of this state.

Bowman now showed for cause, that although one of the lessors was a non-resident at the time of commencing this suit, the other resided in this state, and died pending the suit, and contended that this was sufficient to exempt an attorney from the payment of costs.

Per Curiam. If one of the plaintiffs be resident within this state, at the time of commencing the action, the attorney is not within any rule of this court, subjecting him personally to the payment of costs. After the death of the resident lessor in the present case, the defendant might have applied for a rule to stay proceedings, until security for the costs was

(a) The judgment ought to follow the finding of the referee or of the jury. See *Brown v. Chase*, 4 Mass. R. 436. Hence in *Bent v. Patten*, 1 Rand. 25, it was decided that an error in entering up judgment as to the rate of interest, was not merely a clerical error, but one which could only be rectified by an appellate court; see also, *Hayton v. Hope*, 3 Mis. 53. As to correcting judgments docketed by mistake for less than the true sum; see *Hunt v. Grant*, 19 Wend. 90.

 Franklin v. The United States Insurance Company.

given. Having neglected this, he has no other remedy than to pursue the party himself, if he can be found.

Motion denied, with costs.(a)

[*68] *FRANKLIN *against* THE UNITED INSURANCE
COMPANY.

The affidavit on which a motion is made for a commission, ought to state that there are material witnesses to be examined at the place to which the commission is to be directed. A general affidavit that material evidence is to be obtained in the cause, is not sufficient.

TROUP, for the defendants, moved for a commission to examine witnesses, at Porto Bello, on a general affidavit, that it was supposed sufficient evidence might there be obtained.

Burr, contra.

Per Curiam. The defendants have not brought themselves within the provisions of the act on this subject. They ought at least to have shown, that material evidence exists in the place to which the commission is to be sent. It is an application for a commission to hunt for testimony.

Motion denied.(b)

(a) See 2 R. S. 620, § 1; also Grah. Prac. 2d ed. 505, *et seq.*

(b) "An application for a commission is a non-enumerated motion; 2 Caines, 260; and must be founded on an affidavit, stating that the cause is at issue, or that interlocutory judgment has been entered, as the case may be. It must likewise state the names of the witnesses; 2 Johns. Cas. 68, 285; and that they are material as the party is advised by counsel and verily believes, and are without the state; 1 Wend. 65; and; where the application is on the part of the defendant, it must also state, (provided the party asks for a stay of proceedings, until the return of the commission, but not otherwise; 9 Wend. 444;) that he has a good and substantial defence on the merits, as advised by counsel. 2 Johns. Cas. 285. And; an affidavit was held to be defective, which omitted this clause, although it detailed the probable testimony of the witness, but not in a sufficiently explicit manner, to enable the court to judge that it would amount to a good defence. 1 Wend. 27. But it need not add, 'that he cannot safely proceed to trial, without the testimony of such wit-

The People v. The Judges of Cayuga.

THE PEOPLE *against* THE JUDGES OF CAYUGA, &c.

Where a court of common pleas refuses to give judgment in a cause before them, this court will not grant a *mandamus*, until after a rule to show cause has first been granted for the purpose.

MUMFORD, on an affidavit, stating that a verdict had been obtained, in an action depending in the common pleas of Cayuga county, on which the court refused or delayed to give judgment, moved for a *mandamus* to the judges of that court, commanding them to pronounce judgment on the verdict.

Per Curiam. The practice adopted in such case is first to grant a rule to show cause. On showing cause, it is in the discretion of the court to grant a peremptory *mandamus* or not, as the case may require. Take a rule to show cause.(a)

ness, as he is advised by counsel and verily believes.' 1 Cowen, 209. And the affidavit of a third person, cognizant of the facts, is sufficient, without showing an excuse for its not being made by the party himself. 1 Cowen, 210; 2 Johns. Cas. 69. And where the affidavit is made by the attorney, it need not state the advice of counsel, as to the materiality of the witnesses. 7 Wend. 513. It has also been held, in a recent case in the New York Superior Court, that where a party, upon an affidavit, sets forth the facts which he wishes to establish, under a commission to a foreign country, and shows that those facts can only be proved by persons in the employ of his antagonist, whose names are unknown to him, the court will permit the commission to issue *generally*, without the names of the witnesses, or will grant a stay of proceedings, until their names can be ascertained. *Schaffer and Assur v. Wilcox*, MS. Dec. term, 1829; S. C. 2 Hall, 502." Grah. Prac. 2d ed. p. 592, 593. Add to the authorities above cited, *Seymour's Executors v. Strong*, 19 Wend. 98; *Meech v. Calkins*, 4 Hill, 534; *Bracket v. Dudley*, 1 Cowen, 209.

(a) See *The People v. Judges of Washington*, 1 Caines, 511; *The People v. Troop*, 12 Wend. 183. See also, the note to *Fish v. Weatherwax*, *infra*, 215.

Sealy v. Shattuck.

[*69] *DEMAR AND WIFE *against* VAN ZANDT.

An affidavit, on which a motion is made for a commission to examine a witness, may be made by a third person, not a party to the writ.

ON a writ of right.

Burr, for the defendant, moved for a commission to examine a witness in the state of New Jersey. The affidavit, on which he grounded the motion, was made by a person, not a party to this suit.

B. Livingston, contra.

Per Curiam. Let the commission issue: the affidavit, although made by a third person, shows probable grounds to believe that the testimony of the witness may be material. Besides, it cannot injure the tenant, by creating delay, for the application is not in time to have the effect of suspending the proceedings in the suit, or of excusing the demandants for not going to trial.

Rule granted.(a)

SEALY *against* SHATTUCK.(b)

Where a rule for a joinder in error, to a *certiorari* is obtained, the party must apply at the next term, for the effect of his rule; if a term intervenes, he will be presumed to have waived the rule.

IN error, on *certiorari*, from a justice's court.

A rule was long since obtained, by the plaintiff in error, that the defendant join in error in twenty days after service of notice of the rule, or that the plaintiff be heard, *ex parte*. The notice of the rule was served in July, 1798, and the defendant had not joined in error.

(a) See *Franklin v. The United Insurance Co.*, *supra*, p. 68, n. b. *Murray v. Kirkpatrick*, 1 Cowen, 210.

(b) S. C., C. C. 126.

Rush v. Cobbet.

**Emott* now moved for a reversal of the judgment [*70] below.

Per Curiam. The plaintiff ought to have applied for the effect of his rule, at the next term, after notice of it was proved. Having slept so long, he must be presumed to have waived it. The motion must be denied.

Motion denied.(a)

RUSH against COBBET.

Where the party who sues out a commission to examine witnesses, does not use due diligence to get it returned in proper time, or the return is not properly made, the court will permit the trial to proceed, notwithstanding the commission.

A COMMISSION to examine witnesses in Philadelphia was issued on the application of the defendant, and returned, but the return was stated to be irregular.

Livingston moved for leave to proceed to trial, at the next circuit, and offered to waive the irregularity in the return of the commission, and that the same might be opened, and the defendant have the benefit of the testimony taken under it.

Riker, contra.

Per Curiam. Let the plaintiff have leave to proceed to trial. The commission being taken out on the part of the defendant, it was incumbent on him to have it properly returned, and there has been sufficient time for that purpose. Besides, the offer of the plaintiff to waive the irregularity is fair, and cannot reasonably be refused.

Rule granted.(b)

(a) See n. b. to *Sheldon v. McEvers*, *sup.* vol. 1, p. 69. *Oppie v. Colgrove*, 19 Johns. R. 124. *Burr v. Waterman*, 18 id. 508. 2 Grah. Prac. 2d ed. 955.

(b) "According to the former practice of this court, a commission, duly issued, was *per se* a stay of all proceedings, until the return, provided it were obtained within the first four days of the term after issue joined, unless sooner vacated by the order of the court, which was done after a reasonable time, and no sufficient cause shown. 2 Johns. Cas. 70. If after the four days had elapsed, it did not stay the proceedings, unless so directed by the court, on

 Stewart v. Williams.

[*71] *STEWART *against* WILLIAMS.

An attachment against a sheriff for not bringing in the body of a defendant, cannot be issued until twenty days after service of a notice of a rule for that purpose.

AN attachment was issued against the sheriff of Delaware for not bringing in the body of the defendant. The rule for the attachment was entered in less than twenty days after service of a notice on the sheriff of the previous rule to bring in the body.

Hoffman moved to set aside the attachment, and vacate the rule on which it was founded, for irregularity, with costs.

Per Curiam. Let the attachment be set aside, and the rule be vacated, with costs, to be paid by the plaintiff. The sheriff was entitled to twenty days notice of the rule to bring in the body.(a)

application for that purpose. 18 Johns 136. There is now, however, no rule or practice of the court, by which a rule for a commission in any case operates as a stay of proceedings; and unless it be so ordered by the court, it will not operate as a stay, but will issue according to the statute, 2 R. S. 393, sec. 4, upon such terms as to the court shall seem reasonable. 7 Wend. 520." Grah. Prac. 2d ed. 593.

(a) Supreme Court, April Term, 1798.—*McGourck v. Armstrong*.—*Per Cur.* A sheriff must have twenty days notice of a rule to show cause why an attachment should not issue against him. Judge Radcliffe's MSS. S. C., C. C. 50. See also Grah. Prac. 2d ed. 165, 166, *et seq.*

 Jackson v. Platt.

JACKSON, *ex dem.* MARTIN, against PLATT.

Where, after a verdict, and within the two days allowed for making a case, the defendant's attorney applied to the plaintiff's attorney for certain papers which had been read in evidence, which were necessary to be put in the case, which were refused by the plaintiff's attorney, and the defendant's attorney could not, for that reason, make up the case; the court ordered, that the plaintiff's attorney furnish the papers to the defendant's attorney, or permit him to take extracts, and that the proceedings should, in the meantime, be stayed.

AFTER the trial of this cause, and within the time allowed for making a case, the defendant's attorney applied to the attorney for the plaintiff for the inspection of certain papers, which had been read in evidence, to enable him to make the case, and which were necessary for that purpose. These were refused, and the defendant's attorney for that reason could not make the case. Two orders had been obtained from a judge to stay the proceedings on this *ground, the first of which was served on the plain- [*72] tiff's attorney, who, notwithstanding the order, proceeded to enter a judgment on the verdict.

Van Vechten, for the defendant, now moved to set aside the proceedings subsequent to the verdict, with costs.

Woodworth and *Spencer*, contra.

Per Curiam. It was improper in the plaintiff's attorney to refuse an inspection of the papers, or not to furnish sufficient extracts from them, to enable the defendant's attorney to make the case. It is therefore *ordered*, that the defendant have time to make a case until eight days after the expiration of the present term, and that the plaintiff's attorney furnish the papers required for that purpose, or suffer the defendant's attorney to take sufficient extracts from the same, and that the proceedings in this cause remain in their present state, until the further order of the court.(a)

(a) See 2 *Grah. Prac.* 2d ed. 331; and see note to *Jackson, ex dem. Low v. Hornbeck*, *infra*, 115.

Jansen v. Davison.

JANSEN and others, Administrators, *against* DAVISON.

Where the plaintiffs, who were administrators, in a cause, in the court of common pleas, recovered less than twenty-five dollars damages, and that court gave judgment for the damages, but not for the costs, this court refused to grant a *mandamus* to compel them to give judgment for the costs. The proper remedy is by a writ of error.

A RECOVERY was obtained in the common pleas of Ulster, in favor of the plaintiffs, in the capacity of administrators, for a sum less than 25 dollars. The court below gave judgment for the *damages*, but considering the plaintiffs not entitled to *costs*, refused to give judgment for costs.

Gardinier, for the plaintiff, moved for a *mandamus* to the common pleas, commanding them to give judgment in favor of the plaintiffs, for the costs, as well as the damages recovered.

[*73] **Per Curiam*. This application cannot be granted.

The court below have exercised their judgment on the question of costs. It was not, on their part, a delay or refusal to do what appeared to them to be right. If they were wrong, it was an error of judgment merely, and the proper remedy is by a writ of error, which the party is entitled to have upon an erroneous judgment, whether it be in his favor, or against him. Upon a writ of error, the court above may not only *reverse*, but give such judgment as the court below ought to have given.

Motion denied.(a)

(a) A *mandamus* is only proper where a party has a legal right, without any other appropriate legal remedy, and where in justice a remedy ought to be granted. *The People v. Stevens*, 5 Hill, 616; *Ex parte Lynch*, 2 id. 45; *Boyce v. Russel*, 2 Cowen, 444; *Ex parte Nelson*, id. 417, 423; *The People v. Supervisors of Albany*, 12 Johns. R. 414; *Shipley v. The Mechanics Bank*, 10 id. 484; *The People v. The Mayor, &c. of New York*, 10 Wend. 293; *Justices v. Munday*, 2 Leigh, 165; *State v. Dunn*, Minor, 46; *State v. Holiday*, 3 Halst. 205; *Comms. v. Lynch*, 2 McCord, 170; *State v. Bruce*, Const. Rep. 165, 175. If therefore error will lie, a *mandamus* cannot be granted; *Ex parte Nelson*, *ut supra*; *People v. The Judges of Ulster*, C. C.

The People v. Cochran.

THE PEOPLE *against* COCHRAN.

Where a person had been convicted on an indictment for an assault and battery, and the attorney general moved for judgment, but showed no circumstances attending the offence, by which the court could judge of the degree of punishment which ought to be inflicted, a mere nominal fine was imposed.

THE defendant was indicted for an assault and battery, at a general sessions of the peace, in the county of Otsego. He removed the indictment into this court by *certiorari*, and issue being joined on the plea of not guilty, it was carried down to be tried at the last circuit in that county, by *nisi prius*. On the trial, the defendant appeared, and was convicted upon his own confession, in open court.

The record being returned, the Attorney General moved for judgment, but neither he, nor the prosecutor offered any evidence in aggravation, nor the defendant in extenuation of the offence.

Per Curiam. No circumstances attending the offence on either side being shown, the court have no criterion by which to regulate their discretion in fixing the punishment. We are therefore bound to consider it as a common offence; and, accordingly, impose a fine of one dollar.

*LANSING, Ch. J. *dissented*. He was of opinion [*74] that a higher fine ought to be imposed.(a)

117; *Ex parte Bostwick*, 1 Cowen, 143; *Bank of Columbia v. Sweeney*, 1 Peters, 567. See also note to *Fish v. Weatherwax*, *infra*, 215.

(a) When the prisoner pleads guilty, and the court have no means of determining the extent of the offence charged, the practice is for the court to receive such affidavits as may be offered in aggravation or extenuation thereof. *People v. Watts*, MSS. April term, 1843, N. Y. Gen. Sessions; *People v. Childs*, MSS. June term, 1844, same court.

Jones v. Dunning.

JONES *against* DUNNING AND DOE.

Where the proceedings against bail were irregular, but they suffered two terms to elapse, after a knowledge of the irregularity, before they applied to set them aside, it was held too late.

THE defendants were sued as the special bail of A. B. In January term last, judgment was obtained against them, and in March, an execution issued thereon. The proceedings against them were by writs of *scire facias*, which were returned *nihil*; and it appeared, that the second *scire facias* had not been four days in the sheriff's office. On this ground,

Van Vechten moved to set aside all the subsequent proceedings, for irregularity.

Woodworth, contra.

Per Curiam. There has been a great *laches* on the part of the defendants. They must be presumed to have had actual notice of the proceedings against them, at or before April term last, for the execution issued in March. Two terms have since intervened, and they now come too late to object to these proceedings.

Motion denied.(a)

(a) It is a general rule in regard to applications to set aside proceedings on the ground of irregularity, and "it has been uniformly held, in regard to applications of this nature, that the party must present his application to the court, at the first opportunity after the irregularity has taken place, and before any further proceedings have been had in the cause, by the party complaining of it; 3 T. R. 7, 10; 2 Taunt. 243; 5 T. R. 464; 5 Taunt. 330; 2 B. & Ald. 373; 10 Johns. 486; and the attorney must show due diligence in informing himself of it. 4 Cowen, 91; 2 Johns. Cas. 74; see 4 Paige, 288." Grah. Prac. 2d ed. 702; also id. 703, *et seq.* where a number of examples of this rule are collected. Where a party moves on a mere irregularity he must be held to the rule strictly, and move at the first opportunity or he will be too late. *Caggar v. Gardner*, 1 Howard, N. Y. 142.

 Munroe v. Easton.

*SCOFFIELD AND WIFE *against* LODER. [75]

Where the tenant on a writ of right, vouches, and a writ of summons issues which is irregular in its service, or defective in the return, an *alias summons*, will be granted against the vouchee.

ON a writ of right.

The tenant having vouched one Hunter, a writ of summons was issued, the service of which was irregular, or its return by the sheriff was defective, no proclamation appearing to have been made.

Riker, for the demandant, moved for judgment against the tenant.

Munro, contra, applied for an *alias summons* against the vouchee.

Per Curiam. The tenant is entitled to an *alias summons*. The insufficient service of the first writ, or its defective return, is not imputable to him, and he ought not to be placed in a worse condition than if *nihil* had been returned. Let an *alias* issue.

Motion denied.

MUNROE AND ROE *against* COLLIN EASTON.

A drawer of a bill which has been accepted, is not responsible, until after a default of the acceptor, and the holder must use due diligence to demand payment of the acceptor before he can resort to the drawer.

The indorsee of a bill of exchange, which had been accepted, without demanding payment of the acceptor, or inquiring after the drawer, presented the bill, when it became due, to the payee indorser, who paid it, and charged the amount in his account against the acceptor. The payee afterwards brought an action against the drawer, for so much money paid to the use of the drawer, and offered the bill in evidence in support of the action; it was held that the drawer was not liable.

THIS was an action of *indebitatus assumpsit*, for money

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paid, laid out and expended for the defendant, and for money had and received by him to the use of the plaintiff.

At the trial, in support of his action, the plaintiff gave in evidence a bill of exchange, dated the 27th of April, 1797, drawn by the defendant on David Easton, of Philadelphia, directing him to pay, four months after date, to the plaintiffs, or their order, 750 dollars. The bill was indorsed by [*76] *the plaintiffs, and, successively, by J. P. Mumford, J. Lawrence, P. Ludlow, and A. H. Lawrence. It was accompanied with a protest, in which the notary stated, that at the request of the last indorser, he presented the bill at the house of the plaintiffs, the first indorsers, and demanded payment of a clerk of the plaintiffs, who answered that the plaintiffs were absent, and that he had no orders to pay the bill. The notary was not requested to call on the defendant, nor did he make any inquiries after him.

The plaintiffs were friendly indorsers of the bill, for the accommodation of the drawer, and had no interest in it, and they paid the amount to the holder. The bill was accepted by the drawee, who resided in Philadelphia, and when the bill became due, the defendant was absent, in the West Indies. No demand was made of the acceptor of the bill when it became due.

An account current between the acceptor and his partner, James Cavan, and the plaintiffs was produced, in which the plaintiffs had charged the bill in question to them; and a letter from the plaintiffs to Easton and Cavan, inclosing the account, and requesting payment of the balance, was also produced.

The jury found a verdict for the plaintiffs, contrary to the charge of the judge.

A motion was made, at the last term, to set aside the verdict, and for a new trial.

Pendleton, for the plaintiffs.

B. Livingston and *Eacker*, for the defendant.

KENT, J. delivered the opinion of the court. I have always understood the law to be well settled, that the drawer of a bill is only responsible after a default on the part of the

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acceptor; and that the holder must first demand payment, or use due diligence to demand it of the acceptor, before he can resort to the drawer. (2 Burr. 674.) Nothing of this kind having been done in the present case, I consider the drawer as discharged. No change in the form of the *action can alter the respective rights of the parties in [*77] relation to the bill. This must be considered as a suit by the payee of a bill of exchange against the drawer, and the law is too well settled to admit of a doubt.

If this was to be considered on the ground of an equitable action for money laid out and expended to another's use, and had no reference to the bill, yet the evidence in the case shows that the money was advanced for the use of the acceptor, and not of the drawer. The letter and the account current of the plaintiffs is decisive proof against them.

The verdict, therefore, ought to be set aside, as against law and evidence.

New trial granted.(a)

(a) Mr. Justice Story, in his Commentaries on Bills of Exchange, remarks "the contract of the acceptor, by his acceptance, is, that he will pay the bill, upon due presentment thereof, at its maturity, or its becoming due. The contract of the drawer, and of the indorsers also, respectively is, not only, that the bill shall be duly accepted, but, that the bill shall be duly paid by the acceptor, upon due presentment for payment; and, if not then paid, and due protest is made, and due notice of dishonor is given to them respectively, they will, upon demand, pay the bill, and also the damages and expenses accruing to the holder thereby. It is obvious, from this statement, that, while the contract of the acceptor, is absolute, that of the drawer and indorsers is conditional." Story on Bills, § 323, id. 113, 108, 109. Chitty on Bills, ch. 9, p. 384, 385, 8th ed. 1833. 1 Bell Comm. B. 3, ch. 2, § 4, p. 409, 5th ed.

Skidmore v. Desdoity.

SKIDMORE AND SKIDMORE *against* DESDOITY.

In an action on a policy of insurance on "*all lawful goods, &c. against all risks,*" it was held that the insurance covered all goods lawful to be exported from the United States, though *contraband of war*, and owned by a subject of one of the belligerents.^(a)

THIS was an action on a policy of insurance, upon "*all lawful goods and merchandizes,*" on board of the schooner Fox, from New York to New Orleans, "*against all risks,*" &c. Premium, 13 per cent. Plea, the general issue.

The plaintiffs were British subjects, and partners in trade, residing in the city of New York, and on the 31st of January, 1799, put on board the Fox, at New York, a bale of Russia sheeting, of the value of 475 dollars. The vessel sailed on her voyage and was captured by a British cruiser, and carried into New Providence, where the goods in question were condemned, under the name of *ticklenburghs*, as contraband of war, and enemy's property. The plaintiffs, on hearing of the condemnation, abandoned for a total loss.

It appeared that the premium for underwriting contraband goods was 17½ per cent.

The jury found a verdict for the plaintiff.

[*78] *A motion was made to set aside the verdict, and for a new trial, which was argued by *Riggs*, for the plaintiffs, and *Pendleton* and *Troup*, for the defendant.

Per Curiam. In the case of *Seton and others v. Low*, (1 Johns. Cas. 1,) it was decided, that an insurance on lawful goods extended to all goods which it was lawful by the laws of this country to export, and that the insured was not bound to disclose to the insurer that the goods were of the description of contraband of war. Whatever effect the difference of premium might have, to do away the presumption that the insurer took upon himself the risk of goods of this description without a special disclosure, the stipulation

(a) *Seton & Co. v. Low*, 1 Johns. Cas. 1, and n. a, p. 6. *Juhel v. Rhinelanders*, *infra*, 120. S. C. in error, *infra*, 487.

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in the policy that the insurance was against all risks, must remove all doubt.

In the case of *Goix v. Knox*, (1 Johns. Cas. 337,) it was decided, that an insurance *against all risks*, protects the insured against every loss happening during the voyage, except such as may arise from the *fraud* of the insured. According to these decisions, the policy must be considered as covering all goods lawful to be exported, whatever may be their quality, or whoever may be owner. We are, therefore, of opinion, that the plaintiffs must have judgment.

Judgment for the plaintiffs.(a)

 *SABLE *against* HITCHCOCK.

[*79]

A. the owner of a slave in New Jersey, removed into this state with the slave, and entered into an agreement with B. in this state, by which he put the slave to service to B, until the parties or their executors should mutually agree to annul the agreement. This was held to be a sale of the slave in this state, within the intent and meaning of the act concerning slaves passed the 22d of February, 1788. But such an agreement or sale, if in the course of administration, or by persons acting in *auter droit*, as executors, assignees of absent or insolvent debtors, sheriffs on execution, and trustees would not be within the act, so as to subject the vendors to the penalty, or make the slave free.

IN HOMINE REPLEGIANDO. The declaration was as follows :
 "City and county of New York, to wit : Joseph Hitch-

(a) The concealment of the fact that the goods intended to be covered by the policy were contraband of war seems to have been material within the rule laid down by Tindal, C. J., in *Elton v. Larkins*, 5 Carr. & Payne, 385. "A material concealment" says he "is a concealment of facts, which if communicated to the party who underwrites would induce him either to refuse the insurance altogether, or not to effect it except at a larger premium than the ordinary premium." S. C. 5 Carr. & Payne, 86. 8 Bing. 198. 1 M. & Scott, 323. Every fact and circumstance which can possibly influence the mind of any intelligent insurer in determining whether he will underwrite the policy, or at what premium he will underwrite it is material. *Supra*, vol. 1, p. 5, n. b. In *Seton & Co. v. Low*, no evidence was offered that a higher rate of premium was charged for insurance upon goods that were contraband of war.

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cock was attached to answer unto one Effy Sable, of a plea wherefore he took, and taken, kept the said Effy, and whereupon the said Effy, by Peter Jay Munro, her attorney, complains that the said Joseph, on the first day of November, in the year of our Lord, 1796, at the city and county of New York, and at the first ward of the said city, took the said Effy, and her taken, kept until, &c. whereby the said Effy saith, she is made worse, and hath damage to the value of 200*l*. and thereof she brings suit," &c.

Plea. And the said Joseph, by James Woods, his attorney, comes and says that the said Effy Sable, ought not to be answered, because he, the said Joseph saith, that the said Effy Sable, on the fourth day of July, in the year of our Lord, 1794, was a slave, belonging to one Samuel Ellis, to wit, at the city of New York, in the county of New York; and the said Joseph further saith, that the said Samuel Ellis made his last will and testament in writing, in due form of law, bearing date the 4th day of July, in the year of our Lord, 1794, and thereby constituted Simon Van Antwerp, Elias Burger, and William Reilly, executors thereof, to wit, at the city and in the county aforesaid, and the said Samuel Ellis, after making his said last will and testament, to wit, on the 10th day of July, in the said year of our Lord, 1794, died at the city of New York, in the county of New York, without revoking or altering his last will and testament, and possessed of the said Effy as his slave as aforesaid, and the said Joseph further saith, that the said Simon Van Antwerp,

Elias Burger, and William Reilly, took upon them-
[*80] selves the execution of the said last will and testament of the said Samuel Ellis, deceased, to wit, on the day and year last mentioned, at the city in the county aforesaid, and then and there, as the executors of the said Samuel Ellis, were possessed of the said Effy; and the said Simon Van Antwerp, Elias Burger, and William Reilly, by a certain indenture, between them, as executors of the last will and testament of the said Samuel Ellis, deceased, of the one part, and the said Joseph Hitchcock of the other part,

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under the hands and seals of the said parties respectively, bearing date the 5th day of September, in the year of our Lord, 1794, did place and to service put, with the said Joseph the said Effy Sable, to live and reside with the said Joseph, his executors, administrators and assigns, as his and their servant, and to be used and employed in and about the business of the said Joseph, or in any other way that he, the said Joseph, his executors, administrators and assigns, might think proper, and so to continue, and remain, until the several parties to the said indenture, their several and respective executors, administrators and assigns, should or might mutually consent and agree, to vacate and annul the said indenture, to wit, at the city and county aforesaid; and the said Effy Sable, so being placed and to service put with the said Joseph; and the several parties to the said indenture, not having as yet in any manner consented or agreed to vacate and annul the said indenture, the said Joseph by virtue thereof became and still continues to be entitled to the custody and services of the said Effy Sable, wherefore the said Joseph, on the said 1st day of November, in the year of our Lord, 1796, at the city, county and ward aforesaid, took the said Effy, and her taken, kept until, &c., as it was lawful for him so to do, wherefore he prays judgment, if the said Effy Sable in this behalf ought to be answered.

Replication. And the said Effy prays oyer of the indenture aforesaid, and to her it is read in these words, to *wit: "This indenture, made the 5th day of Sep- [*81] tember, in the year of our Lord, 1794, between Simon Van Antwerp, Elias Burger, and William Reilly, of the city of New York, executors of the last will and testament of Samuel Ellis, deceased, of the one part, and Joseph Hitchcock of the said city, sail-maker, of the other part, witnesseth, that the said parties of the first part, in consideration of the sum of 10s. current money of the state of New York, to them the said parties of the first part, in hand paid by the said Joseph Hitchcock, at and immediately before the ensealing and delivery of these presents, do place and to service put, with the said Joseph Hitchcock, a certain negro wench named Effy,

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and her male child, late the property of the said Samuel Ellis deceased, to live and to reside with the said Joseph Hitchcock, his executors, administrators and assigns, as his and their servant, and be used and employed in and about the business of the said Joseph Hitchcock, or in any other way that he, the said Joseph Hitchcock, his executors, administrators or assigns may think proper, and so to continue and remain, until the several parties to these presents, their several and respective executors, administrators and assigns, shall or may mutually consent and agree to vacate and annul these presents; and the said parties of the first part, for themselves, their executors and administrators, do covenant and agree with the said Joseph Hitchcock, his executors, administrators and assigns, that the said negro, and her said male child, shall remain with the said Joseph Hitchcock, his executors, administrators and assigns, in manner as aforesaid, and until all the parties to these presents as aforesaid, shall mutually agree to annul and vacate these presents, without any the let, trouble, hindrance, molestation, or denial of them, the said parties of the first part, their executors, administrators and assigns, or either of them, or any person or persons, claiming or to claim, by, from or through them, or either of them; and the said Joseph Hitchcock for himself, his [*82] heirs, executors and administrators, doth *covenant and grant, with the said parties of the first part, their executors, administrators and assigns, and every of them, that during all the time aforesaid, the said wench and her said male child, shall be kept, provided, and maintained at the sole expense, charge and trouble, of him, the said Joseph Hitchcock, his executors, administrators and assigns, in such way, that during all the aforesaid time, the said parties to the first part, their executors and administrators, and every of them, and the estate of the said Samuel Ellis, deceased, shall and may never become, in any way whatsoever, chargeable therewith. In witness whereof," &c. which being read and heard, the said Effy says, that she ought to be answered, notwithstanding any thing by the said Joseph above, in pleading, alleged, because the said Effy says, that, after the

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1st day of June, in the year of our Lord, 1785, and also after the 22d day of February, in the year of our Lord, 1794, the said Samuel Ellis, in his lifetime, did dwell and reside in the state of New Jersey, out of the state of New York, and that the said Effy, then being the slave of the said Samuel, was held and detained by the said Samuel as his slave, within the said state of New Jersey, to wit, on the day and year last aforesaid, and that afterwards, to wit, on the same day and year last aforesaid, the said Samuel, in his lifetime, did bring the said Effy, from the said state of New Jersey, into the state of New York, to wit, to the city and county of New York, and ward aforesaid, and there held her as his slave, until his death. And this she is ready to verify, wherefore the said Effy prays judgment and her damages, occasioned by the taking and keeping of the said Effy, &c.

To this replication, there was a general demurrer, and joinder.

RADCLIFF, J. On these pleadings, the question is, whether the disposition made of the plaintiff, by the executors of Samuel Ellis, to the defendant, was a sale, within the *meaning of the act of the 22d February, 1788,(a) by [*83] which "in order to prevent the further importation of slaves into this state," it is enacted, that if any person shall sell as a slave within this state, any negro or other person who has been *imported or brought* into this state, after the 1st June, 1785, he shall be deemed guilty of a public offence, and forfeit 100*l.* and the person so imported or brought into this state, shall be *free*.

1. I consider the disposition of the slave, made by the executors as equivalent to an absolute sale. It was probably made in the manner expressed in the indenture, under an apprehension that the condition of the plaintiff came within the description of the act, and with a view to elude the prohibition. It gives to the defendant a complete authority over her as his servant, and unlimited in its duration. It is not only unlimited, at the pleasure of the defendant, but irrevoc-

(a) This act comprises the several then existing acts concerning slaves, and which were passed prior to the 1st June, 1785.

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cable, without the consent of *both parties*, that is, without a *new contract*, to rescind the old. This is, to every purpose, a sale. Besides, here are no circumstances to denote a hiring or indenting as a servant, no time for the expiration of the indenture, no right to the return of the slave, or to demand payment for her services, no subsequent responsibility on the part of the executors, for her maintenance, which was expressly assumed by the defendant. In short, no title or control over her, was in any shape retained by the executors, who parted with all their property in the slave. But,

2. I am of opinion, that the sale by the executors was not a sale within the spirit of the act. The objects of the act are sufficiently answered, if it be restrained in its operation to the ordinary traffic or sale of slaves, brought into this state, by persons acting *in their own right, and for their own emolument*. It ought not to be deemed to apply to those who act involuntarily, for the benefit of others, and in performance of a trust imposed by law. Acting in that [*84] capacity, they cannot be supposed to incur the guilt ascribed to this traffic, and ought not to be liable for its consequences. In all cases, therefore, of persons acting in *autre droit*, as executors, assignees of absent or *insolvent* debtors, sheriffs on sales by execution, and trustees on whom the duty devolves, by the interposition of law, I think the act cannot apply. It would be highly injurious to creditors to extend it thus far, and extremely embarrassing to persons acting in these capacities. What would be their situation and duty in regard to such slaves? They are not bound to keep them as their own, and if kept as the property of the estate which they represent, it would be impossible to convert them to any valuable purpose, in the execution of the trust, or to calculate the further responsibility which their age or disability might occasion. By selling them, they would incur a heavy penalty, besides the forfeiture of the slaves. It would be better the law should declare the property extinct, and annihilate the right. In the present case the removal of the testator into this state, without a consequent sale by him, created no forfeiture. The property of the slave continued

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lawfully in him ; and, unless extinguished by his death, was transmitted to the executors, and became assets in their hands. If so, they had a right to dispose of her for the benefit of the estate of their testator, and the sale was not within the act.

I am, therefore, of opinion, that there should be judgment for the defendant.

KENT, J. The question raised by these pleadings, is whether the act of the executors in placing the plaintiff to service, as stated in the pleadings, be a sale within the act of the 22d February, 1788, which declares, "that if any person shall sell as a slave within this state, any negro or other person, who has been imported or brought into this state, after the 1st June, 1785, such seller, his factor or agent, shall be guilty of a public offence, and shall forfeit 100*l*. and the person so imported and sold shall be free."

"I have no difficulty in considering the deed, set [*85] forth in the replication, as amounting to a sale. A complete power over the service and person of the plaintiff, is transferred to the defendant, for so long time as he shall please, which may well include the whole life of the slave, and be, in every respect, equal to an absolute ownership. A transfer depending on the pleasure of the vendee, is an absolute sale. The only question that can then arise in this case, is, whether a sale by executors in the course of administration, be such a sale as is contemplated and prohibited by the act ?

This part of the act, concerning slaves was made, as its preamble imports, to prevent the further importation of slaves into this state ; a policy, the direct counterpart to that contained in one of our colonial statutes, (Colony Laws, vol. 1. 283, 284,) which declared, that all due encouragement ought to be given to the direct importation of slaves. In seeking the true construction of the act, we ought to keep steadily in our eye, the mischief intended to be prevented, which was the foreign traffic in slaves ; and the legislature took a measure decisively calculated to destroy it, by forbidding any person, his factor or agent, to sell any slave so imported, or, in other words, to use him as an article of commerce. The

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act was hostile to the importation, and to the exportation of slaves, as an article of trade, not to the existence of slavery itself; for it takes care to re-enact and establish the maxim of the civil law, that the children of every female slave shall follow the state and condition of the mother.

If we can then fulfil the object of the law, and, at the same time, prevent the rigorous penalty of the act from working injustice, or impairing the requisite funds to pay debts, we, undoubtedly, do all that was within the intent and meaning of the provision. It appears to me, therefore, to be the better interpretation, to consider sales made in the ordinary course of law, and which are free from any kind of collusion, as not within the provision of the act.

While slaves are regarded and protected as property, they ought to be liable to an essential consequence attached [*86] to *property, that of being liable to the payment of debts. If it is otherwise, the debtor is possessed of a false token, and the creditor is deceived. By considering the sale mentioned in the act, as confined to a voluntary disposition of the slave, for a valuable consideration, by the owner himself, we are enabled effectually to reach the mischief in view, the importation of slaves for gain, and we take away every such motive to import them.

I cannot acquiesce in the interpretation, that the importer can sell for his own life. Importations with liberty to sell for the life of the importer, would go far to revive and animate this impolitic and unjust commerce. The tenure of the slave *per auter vie*, is, indeed, not quite so valuable as for the life of the slave, but still it would be highly valuable, and the commerce would be thrifty.

Upon the death of the importer, the slave cannot be considered as free; nor do I perceive that the act gives color to such a conclusion. If the slaves belong to the estate, they must go to the executor as assets. He becomes their master, and is liable for their trespasses, and for their maintenance, if infirm; and it results, inevitably, that he must be able to sell them, because he must answer for them as assets.

For these reasons, I am inclined to think, that slaves so

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imported, may be held as assets by creditors on execution, and by executors, in the course of administration ; and consequently, that judgment must be for the defendant.

LEWIS, J. concurred.

BENSON, J. (After stating the facts in the case.) The question is, whether a slave, *so imported*, or *brought* into the state, and remaining unsold, can, on the death of the master or owner, be sold by his executor ?

By the law of this state, slavery may exist within it. One person can have property in another, and the slave is part of the goods of the master, and may be sold, or otherwise aliened by him ; or remaining unaliened, is, on his death, *transmissible to his executors ; but by the act under [*87] consideration, a slave *imported* or *brought* in, after the first June, 1785, is not to be sold, *as a slave*, and if the slave should be so sold, the master, and every other person privy with him to the sale, are liable to a penalty, and the slave becomes *free*, by *force* of the *sale* itself. Though these two effects of the sale are *distinct*, and the latter, perhaps, capable to be considered as beneficial, yet as they must necessarily ever be *concomitant*, the same sale, or act of alienation, always producing them both, and at the same time, the entire clause or section is thereby rendered *penal*, of *strict interpretation*, and, consequently, *constructive* sales are to be altogether excluded.

It is further to be premised, that the derogation from the rights of the master, intended by the act, is such, that in order to decide on its nature and extent, it will be requisite to examine and pronounce on the whole of the *residue* of the right of alienation, to be deemed left in him, as to a slave so imported or brought in. I, therefore, state, 1. That so much of the benefit intended to the slave, as consists in the *chance*, if it may be so expressed, of *becoming free*, in consequence of a sale, is only to the person *imported* or *brought* in, as to be distinguished from any participation in it by the *issue* of the person. So that where the person is a female, the master has a right to sell the issue, born after she shall have been

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imported, or brought in, and before she herself shall happen to become free, equally as he may sell any other slave.

2. That the act only prohibits a sale, or an alienation for a *valuable consideration*, as to be distinguished from a *gift*. a *gratuitous* alienation, or for *good consideration only*, and consequently, the master has a right to give away the slave.

3. That the act does not prohibit every sale, but only such sales, where the slave is sold as a slave, to become the slave of the buyer, and where the whole of the estate or interest of the master is intended to pass to the buyer, without any reversion in the master. It must be a sale in [*88] *fee, as to be distinguished from a sale for a term depending on a limitation of time, either contingent or definite, when the sale is, as it were, to expire, and the slave again to revert to the master; but it being obvious, that if the master may sell for a term, and be unrestrained as to the limitation of it, that he may then, by the mere form of the sale, prevent the slave from the benefit of the act, the law will, therefore, implicitly supply the limitation, and which can be no other than the life of the master himself.

4. As the consequence from the two last propositions, the master has a right to sell for his own life, or for any other uncertain term, or for a term of years; and where the sale is for any other term, than the life of the master, if it should not happen to expire, by its own limitation, in his lifetime, it will expire on his death, and be good for his life. In short, he has an estate or interest for his own life only, in the slave; and if the slave shall have been given away by the master, and by his donee or any other, and so by donee to donee, each will, in like manner, have an estate or interest for his own life in the slave.

This exposition appears, on the whole, to satisfy the act, preferably to any other which has occurred; for let it suffice to state one consequence only, should the slave be adjudged transmissible to the executor, namely, that the goods of the testator coming to the executor, subject to a power and trust to sell them, he may sell the whole of them, (and he must sell a portion of them, if wanted, to raise moneys for the pay-

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ment of debts and pecuniary legacies;) and it not being possible to deduce or conceive his life, or any other given time, as the limitation of a term for which only he may sell, he may therefore sell in perpetuity, and if so, then there may be a sale of a slave, as a slave, and neither the seller be liable to the penalty, nor the slave be free, which is contrary to the express provision of the act.

For these reasons, I am of opinion, that the plaintiff is entitled to judgment.

*LANSING, Ch. J. not having heard the argument [*89] in the cause, gave no opinion.

Judgment for the defendant.(a)

FISH *against* FISHER.

Where a slave, aged twenty-five years, ran away from his master in New Jersey, and came to New York, and his master came to New York and there entered into an agreement by which he let the slave to a person in New York for twenty years, for the consideration of 225 dollars; giving full power to correct imprison, and exercise all the authority over the slave which the master could lawfully do; it was held to be an importation and sale within this state, within the meaning of the act of 22d February, 1788, concerning slaves, and that the slave was, therefore, free.

In homine replegiando. This cause came before the court on a special verdict. The material facts it contained are as follows:

The plaintiff was the slave of one Van Voorst, who resided at Bergen, in the state of New Jersey. He ran away from his master, and came to the city of New York. Van Voorst came to New York on the 26th of February, 1795, and entered into an agreement with the defendant, under his hand and seal, by which, for the consideration of 225 dollars, he let the plaintiff, who was twenty-five years of age, to the defendant for twenty years, with authority to correct, im-

(a) This judgment was afterwards (1802) affirmed, in the court for the correction of errors.

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prison, and exercise all such lawful authority over him, as he, Van Voorst, himself before that time might do. The defendant, who lived in New York, then took the plaintiff into his custody.

The cause was argued by *Harison* and *Munro*, for the plaintiff, and *Evertson* for the defendant.

Two questions were raised for the consideration of the court:

1. Whether the plaintiff was to be considered as a slave imported or brought into this state, within the meaning of the 4th section of the act concerning slaves, passed the 22d of February, 1788. (Greenleaf's ed. Laws, vol. 2, p. 85.) If so, then,

2. Whether the letting to hire, in the present case, was a sale of the plaintiff, as a slave, within the meaning of the act.

[*90] *RADCLIFF, J. By the act of the 22d of February, 1788, in order "to prevent the further importation of slaves into this state," it is enacted, that if any person shall sell as a slave within this state any negro or other person who *has been imported or brought* into this state after the 1st June, 1785, he shall be deemed guilty of a public offence, and forfeit 100*l.* and the person so imported or brought into this state shall be *free*.

1. The first question is, whether the slave was brought into this state within the meaning of the act.

2. Whether the letting to hire, as above stated, was a sale within the act.

With respect to the first question, although the preamble of the act seems to apply to the case of foreign importation only, yet by the enacting clause it manifestly extends to all classes of slaves in any way *brought into this state*. Here the slave eloped from his master. He certainly could not be said to be brought into this state, if the master, instead of reclaiming him, had not sanctioned his coming by the subsequent disposition of him to the defendant. He thereby made the change of the residence of the slave his own act, and the slave, by the consent of his master, became domiciliated here. This is the same, in effect, as *bringing* him, in

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the first instance, and I think equally within the mischief contemplated by the legislature. If we should adopt a different construction, it would be easy for masters, having the absolute control of slaves, to evade the prohibition, by suffering, or tempting them to escape into this state, and thus, by a new mode, introduce a fraudulent traffic, contrary to the intent of the act. The act, it is true, is highly penal, and ought, therefore, when it operates upon the offender, to be construed strictly; but it is also in favor of personal liberty, and to this end, when it operates upon the offence only, ought to be liberally expounded.

2. I think the letting of the slave to the defendant was a sale, designed to be in evasion of the act. It has all the characters of a sale, instead of a letting for hire. The consideration is equivalent to the ordinary value of a slave.

*It is a sum *in gross*, without any *annual* or other [*91] *periodical* reservation or payment, for *services* to be performed, and without any deduction, in case of the death or disability of the slave. The term of service is 20 years, by a slave advanced to the age of 25, a period beyond the ordinary calculation of such a life, and the power granted over the slave is absolute and irrevocable. All these circumstances plainly indicate that the intent was to cover a sale, in evasion of the act.

I am, therefore, of opinion, on both points, that the plaintiff is entitled to judgment.

KENT, J. I am also of opinion that the case of a slave running away from his master into this state, and followed by the act of the master here in selling him within the state, is to be considered as a constructive bringing into the state, within the purview of the act. The subsequent sale by the master gives a sanction to the act of the slave, and may be deemed evidence of his assent. We may consider the act as intending to prevent not only a traffic in slaves, but the increase of them from abroad; and without adopting this construction, the act may, with great ease, be eluded.

On the second question, it is a little difficult to draw the precise limit between a lawful hiring of a slave so imported,

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and a sale. But I think the judgment of law, upon the agreement stated in the verdict, must be, that it is a sale within the act. It is for a sum in gross, equivalent nearly to the ordinary value of a slave, and for a term of years, equal to the value of his life. An absolute authority is also transferred over the person of the slave, and no annual or periodical render is reserved, which is the usual incident of a letting to hire.

I am of opinion that judgment ought to be given for the plaintiff.

LANSING, Ch. J. was of the same opinion.

[*92] *BENSON, J. *dissented*. He agreed that where a slave runs away from his master and comes into this state, and is retaken here and sold, the slave is to be considered as *imported* or *brought in*, and sold, within the intent of the statute. But, for the reasons given by him in the case of *Sable v. Hitchcock*, he did not think that the agreement in the present case was to be so understood, as made or intended, in fraud or evasion of the act, as that it ought to be construed a sale in perpetuity, or so as to produce the effect of making the slave free by law; but that, on the contrary, it was good for twenty years, if Van Voorst should so long live.

LEWIS, J. also dissented.

Judgment for the plaintiff.

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RUTGERS and others *against* LUCET.(a)(b)

L., as agent of G., received of R., on the 25th of March, 1796, a bill of exchange for \$601, drawn by D. in favor of R. upon F. and accepted by him, which L. promised to return to R. "on demand, or the amount thereof." The bill was received by L. from motives of friendship to R. and to recover the amount for him by obtaining a credit for it to G. against the drawer D. in an arbitration then depending between D. and G. The arbitrators allowed the bill as an item in the account of G. against D. and made an award against G. which was substantially performed by both parties; L., as the agent of G., paying the amount found against the latter to D., and promising him to pay the amount of the bill to R. It appeared that at the time L. received the bill a suit was depending on it against the acceptor F., that interlocutory judgment was obtained in that suit in April term, 1796, and a writ of inquiry was noticed from time to time, but could not be executed in consequence of a failure upon the part of L. to procure the bill so that it could be produced on the execution of such writ. After the last application for the bill in July, 1797, the bail of F., who had previously removed to South Carolina, informed R. that he had failed and could not pay this debt. Afterwards, in August following, the bill was tendered by L. to R., who refused to accept it. It did not appear that L. at any time informed R. that the bill had been allowed to G. by the arbitrators, or that the award had been fulfilled by D., but merely that he told R. that it was still in the hands of the arbitrators.

In an action of assumpsit by R. against L. on his agreement to return the bill on demand or the amount thereof: *held*, that on the performance of the award the bill was discharged and became the property of D.; that R. could no longer maintain an action upon it, and therefore it could not be returned within the *spirit* of the agreement between L. and R.

Also, that the special undertaking of L., although gratuitous, was binding upon him, inasmuch as he had actually entered upon the performance of it.

(a) The marginal note of Mr. Johnson is as follows: "A. received of B. a bill of exchange drawn by C. and which he promised to return to B. on demand, or pay the amount thereof. Though the bill was received by A. as a matter of courtesy, and was to be used for the benefit of B. yet as A. did not return the bill on demand, nor in due season, he was held, under the circumstances of the case, liable to B. for the amount."

(b) The memorandum of this case in the MSS. of Judge Radcliff is as follows: "*Lucet etc. Rutgers et al.*—1. An agent receiving a bill of exchange as bailee from another, to be credited to his principal in other transactions, or to return the bill, is liable for the amount of the bill if such credit be obtained and the means of paying it pass through his hands.

2. A general bailee is bound to use a degree of diligence and attention adequate to the trust reposed in him, and according to its nature.

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A mere agreement to undertake a trust in *future* without compensation is not obligatory; but when once undertaken, and the trust actually entered upon, the bailee is bound to perform it according to the terms of his agreement.

Also, that the special undertaking of L. was *personal*, and he was, therefore, bound by it.

Supposing the bailment to R. to have been *general*, and that he was subject to no special agreement to return the bill or pay the amount, he was still bound to use a due diligence and attention adequate to the trust reposed in him, to perform his engagement with good faith, and neither do nor omit anything other than the nature of the trust required.

THIS was an action of *assumpsit*. The declaration contained six counts, upon an agreement made by the defendant to return a certain bill of exchange, delivered to him by the plaintiffs, and which they alleged was not returned. The cause was tried before the Chief Justice, at the last March circuit, in New York.

The plaintiffs produced the following receipt by the defendant. "Received, New York, 25th March, 1796, of Rutgers, Seaman & Ogden, a draft drawn by Samuel Downing, in their favor, and accepted by Royal Flint, bearing date the 14th August, 1795, at 60 days sight, for 601 dollars and 88 cents, which draft I promise to return them on demand, or the amount thereof." It also appeared from the evidence, that the defendant so received the bill for the purpose of obtaining a credit for it to one Greenleaf against [*93] the *drawer, Downing, in an arbitration then depending between them, and, in this manner, to recover the amount for the plaintiffs. The defendant did this from motives of civility and friendship to the plaintiffs. The arbitration related to business in which the defendant acted as the attorney of Greenleaf, by virtue of a power for that purpose from him. The bill was immediately offered to the arbitrators, as an item in the account of Greenleaf against Downing, and allowed by them. Their award was made on the 30th of March, 1796, about five days subsequent to the delivery of the bill to the defendant, and by this award, after crediting the amount of the bill to Greenleaf, he was still ordered to pay to Downing the sum of 523*l.* 3*s.* on the

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20th April, then next. The award on that day was substantially performed by both parties, and the defendant paid that sum to Downing for Greenleaf, and informed Downing that he would also pay the amount of the bill to the plaintiffs. It appeared by a receipt of the plaintiffs, that the defendant paid them on the 2d of December, 1796, *on account of the bill*, the sum of 140 dollars and 84 cents. This sum, however, one of the witnesses, on the part of the defendant stated, was *money lent* by the defendant to the plaintiffs, *at their request*, which they promised to return, in case the bill should not be recovered by the defendant.

It also appeared that at the time the defendant received the bill, there was a suit depending on it against the acceptor, Royal Flint; that interlocutory judgment was obtained in that suit, in April term, 1796, and a writ of inquiry was noticed to be executed; that the plaintiffs then called at the defendant's house for the bill, in order to produce it on executing the writ; that they could not procure it on account of the defendant's absence from home, and the writ was not executed; that in June following, the plaintiffs called again for the same purpose, and could not get the bill for the same reason. They then mentioned the subject to the agent of the defendant, who promised to write for the bill and endeavor to procure it; but it was not procured, and the execution of the writ of inquiry was again prevented. [*94] Some time in June, 1797, the defendant was again called upon for the bill, and, for the first time, was personally seen, when he engaged to procure the bill by a certain day then agreed upon, in order that the writ of inquiry might be executed, before the ensuing July term; but it was not so procured, and the writ of inquiry was again delayed. In the same month of July, and after the last application for the bill, the bail of Flint, who had previously removed to South Carolina, informed the plaintiffs that he had failed, and could not pay this debt, if a recovery should be had against him. Afterwards, about the 3d of August following, the bill was tendered by the defendant to the plaintiffs, who refused to accept it. It had previously been deposited with one of the

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arbitrators, to be delivered to Downing, in case the award should be complied with on his part, and the arbitrators, supposing it had not been complied with, sent the bill to the defendant. It did not appear that the defendant, at any time, informed the plaintiffs that the bill had been allowed to Greenleaf by the arbitrators, or that the award had been fulfilled by Downing, but merely that he told them that it was still in the hands of the arbitrators.

On this evidence, the judge, at the trial, was of opinion that the plaintiffs were entitled to recover, and a verdict was found accordingly.

There had been a former trial in this cause, when a verdict was found for the defendant; that verdict was set aside, and a new trial awarded, on the ground that the evidence was imperfect, and the merits of the case so obscure as to require a further examination.

A motion was now made to set aside the present verdict, and for a new trial, which was argued by

B. Livingston and Bogert, for the defendants, and by
Harrison and T. L. Ogden, for the plaintiffs.

Per Curiam. 1. The purpose for which the defendant took the bill was fully answered, when it was allowed [*95] by the arbitrators to the credit of Greenleaf. This appears to have been the object which the parties had in view, and the event on which, according to the tenor of the receipt, the defendant was to pay the money. At the time of obtaining this credit, or, at least, on the performance of the award, the bill was discharged, and became the property of Downing. The defendant could not then return it, within the spirit of his agreement with the plaintiffs, for it could not have been intended that he should have the liberty of returning it when satisfied and paid. The plaintiffs could no longer maintain an action upon it; their debt was changed and converted into a demand against Greenleaf, or against the defendant. Although they might sustain their action against Greenleaf, we think they have also their remedy against the defendant. His stipulation expressed in the receipt was to return the bill, or pay the amount. Here was

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a special undertaking, which, although gratuitous on the part of the defendant, was obligatory, for a mandatary or bailee, without compensation, may bind himself to be answerable even for casualties. (Jones on Bailment, 40, 41 ; Ld. Raym. 919 ; 1 Salk. 26.) A mere agreement to undertake a trust, *in futuro*, without compensation, it is true, is not obligatory ; but when once *undertaken*, and the trust actually *entered upon*, the bailee is bound to perform it, according to the terms of his agreement. The confidence placed in him, and his undertaking to execute the trust, raise a sufficient consideration ; a contrary doctrine would tend to injure and deceive his employer, who might be unwilling to consent to the bailment on any other terms.(a)

(a) It was formerly a question whether any action lay for a total failure to perform a gratuitous executory undertaking. This subject was considered by Sir William Jones, in his elegant essay on the Law of Bailments, and he arrived at the conclusion that the action could be maintained. "Suppose," he says, "for instance, that Robert's cornfields are surrounded by a ditch or trench, in which the water from a certain spring used to have a free course, but which has of late been obstructed by soil and rubbish ; and that Robert informed his neighbor Henry of his intention speedily to clear the ditch, Henry offers and undertakes immediately to remove the obstruction and repair the banks *without reward*, he having business of the same kind to perform on his own grounds : if, in this case, Henry neglect to do the work undertaken, 'and the water, not having its natural course, overflow the fields of Robert, and spoil his corn,' may not Robert maintain his action on the case ? Most assuredly ; and so in a thousand instances of proper bailments that might be supposed, where a just reliance on the promise of the defendant prevented the plaintiff from employing another person, and was consequently the cause of the loss which he sustained ; Year B. 19 Hen. VI. 49 ; for it is, as it ought to be, a general rule, that, for every *damnum injuria datum*, an action of some sort, which it is the province of the pleader to devise, may be maintained ; and, although the *gratuitous* performance of an act be a *benefit* conferred, yet, according to the just maxim of Paulus, *Adjuvari nos, non decipi, beneficio oportet* : D. 13, 6, 17, 3 ; but the *special* damage, not the *assumption*, is the cause of *this* action ; and, if *notice* be given by the mandatary, *before any damage incurred, and while another person may be employed*, that he cannot perform the work, no process of law can enforce the performance of it. A case in Brooke, made complete from the Year Book, to which he refers, seems directly in point ; for, by Chief Justice Fineaux, *it had been adjudged*, that, 'if a man assume to build a house for me by a certain day, and do not build it, and I suffer damage by his *nonfeasance*, I shall have an action on the case, as well as if he had *done it amiss* : ' but it is possible that

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In the present case, taking the receipt in connection with the evidence that the defendant was to obtain a credit for

Fineaux might suppose a consideration, though none be mentioned; Bro. Abr. tit. Action, Sur le Case, 72." Jones on Bailments, Am. ed. 1836, p. 56, 57.

The general rule of the Civil Law accords with this view of the subject. *Sicut autem liberum est, mandatum non suscipere; ita susceptum consummari oportet, nisi renunciatum sit. Si susceptum non impleverit, tenetur. Quod mandatum suscepit, tenetur, etsi non gessissit.* Dig. Lib. 17, tit. 1, l. 5, § 1; Id. l. 6, § 1; Id. l. 22, § 11; Inst. Lib. 3, tit. 27, l. 11; Pothier, Pand. Lib. 17, tit. 1, n. 25 to 29; Pothier, Contrat de Mandat, n. 38; Ayliffe, Pand. B. 4, tit. 10, p. 478, 479. *Qui mandatum suscepit, si potest id explere, deserere promissum officium non debet; alioquin, quanti mandatoris interit, damnabitur.* Dig. Lib. 17, tit. 1, l. 27, § 2; Pothier, Contrat de Mandat, n. 38. *Procuratorem non tantum pro his quæ gessit, sed etiam pro his, quæ gerenda suscepit, prestare necesse est.* Cod. Lib. 4, tit. 35, l. 11; Pothier, Contrat de Mandat, n. 38. Domat, 1 Domat, B. 1, tit. 15, § 3, art. 1, 12, § 4, art. 3, 4, 5; Pothier, Contrat de Mandat, n. 38 to 42;—the modern Code of France, art. 1991 to 1997;—and the Scotch Law, Ersk. Inst. B. 3, tit. 3, § 35, 40; 1 Stair, Inst. B. 1, tit. 12, § 9; recognize the rule in its full extent. Story on Bailments, § 164. This is the reason which is given in the Institutes for the rule: *Mandatum non suscipere cuilibet liberum est; susceptum autem consummandum est, aut quam primum renunciandum, ut per semetipsum aut per alium, eandem rem mandator exequatur.* Inst. lib. 3, 27, 11.

But by the Common Law, *ex nudo pacto non oritur actio*; Noy. Max. 24; Bro. Max. 336; a consideration must intervene to give utility to the agreement. A declaration, therefore, which stated that the defendant, who was a carpenter, was retained by the plaintiff, and undertook to repair a certain house, which he failed to do *per quod* the walls of the plaintiff's house were damaged, was held bad because there was no allegation of consideration, or that the defendant entered upon the work. *Elsée v. Gatward*, 5 T. R. 143. And so where A. and B. were joint owners of a vessel, and A. voluntarily undertook to get the vessel insured, but neglected to do so and the vessel was lost, it was held that no action would lie against A. though B. sustained a damage by the nonfeasance. *Thorne v. Deas*, 4 Johns. R. 84; *McGee v. Bast*, 6 J. J. Marsh. 455; 2 Wash. 203. See *Smedes v. Bank of Utica*, 20 Johns. R. 372, 379. S. C. in error, 3 Cowen, 662, 683. 2 Kent Comm. 569, 570, 571. Story on Bailment, ed. 1846, § 166, *et seq.*

If however, one enter upon the performance of a gratuitous undertaking, the confidence induced thereby is a sufficient consideration to create a duty upon the part of the mandatory to exercise that degree of diligence which is required of bailees without compensation. 1 Smith Lead. Cas. 96, n. to *Coggs v. Bernard*. Story on Bailments, ed. 1846, § 182 a. 2 Kent Comm. 572. He is liable therefore for no act or omission short of gross negligence. *Stanton v. Bell*, 2 Hawks, 145. *Sodowsky v. McFarland*, 3 Dana, 205. *Tracy v. Wood*, 3 Mason, 132. *Tompkins v. Saltmarsh*, 14 S. & R. 275. *Bland v.*

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the bill to Greenleaf, in the arbitration with Downing, the undertaking is to be considered as *personal* on his part, and to result in this, that if such credit was allowed, he would be answerable for the amount to the plaintiffs. It can admit of no other construction, unless we suppose the parties considered the defendant as acting also, in relation to this bailment, as the factor or agent of Greenleaf, and that they thereby meant to bind his principal only. This cannot well be "supposed, for it is wholly foreign from the [*96] nature and scope of such an agency. The engagement was therefore *personal*, on the part of the defendant, and Greenleaf could never be liable on the ground of his agent's agreement respecting the bill, nor on any other ground than actually receiving the money to his use.(a) But,

Wormack, 2 Murph. 373. *Beardslee v. Richardson*, 11 Wend. 25. *Anderson v. Foresman*, Wright, 598. The leading case upon this subject is *Coggs v. Bernard*, Ld. Raym. 909, where one who had undertaken, without compensation, to carry goods safely and securely, was held responsible for damage that they sustained in their carriage through his neglect. In accordance with the principle of that case, it has been held that an action would lie against a gratuitous agent, who on procuring the renewal of a fire policy, neglected certain formalities, the omission of which rendered the policy inoperative; *Wilkinson v. Coverdale*, 1 Esp. N. P. C. 74; see *Setter v. Work*, Marshall on Ins. 299; or in one who carrying a parcel, lost it by "great negligence;" *Beauchamp v. Powley*, 1 M. & Rob. 38; or one who in keeping money, by "gross negligence" on his part, it was stolen; *Doorman v. Jenkins*, 2 Ad. & Ell. 256; or one who having received and undertaken to deliver a letter containing money, to pay a note and take up the note, should neglect to carry the letter or take up the note; Story on Bailments, § 171 a, § 171 b; or one who having received and undertaken to collect a note when due, or give notice of dishonor to the indorsers, omits to do either; *Smedes v. Bank of Utica*, *ut sup.*; *Bank of Utica v. McKinstry*, 11 Wend. 473; *Beardsley v. Richardson*, *id.* 25; *Callender v. Oelricks*, 1 Arnold R. 401, 402. The mandate having been undertaken, the mandatory must perform it according to the terms of his lawful contract, which may be enlarged or restricted as the parties please. Jones on Bailments, Am. ed. 1836, p. 53, 54; Story on Bailment, ed. 1846, § 161, § 164.

(a) "In general, when a man is known to be acting and contracting merely as the agent of another, who is also known as the principal, his acts and contracts, if he possesses full authority for the purpose, will be deemed the acts and contracts of the principal only, and will involve no personal respon-

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2. Supposing the bailment to the defendant to have been *general*, and that he was subject to no special agreement to

ability on the part of the agent, unless the other circumstances of the case lead to the conclusion, that he has either expressly or impliedly incurred, or intended to incur, such personal responsibility." Story on Agency, 2d ed. § 261. 3 Chitty on Comm. and Manuf. 211, 212. Paley on Agency, by Lloyd, 368, 369. *Paterson v. Gandesequi*, 15 East, 62. *Ex parte Hartop*, 12 Ves. 352. *Owen v. Gooch*, 2 Esp. R. 567. *Mauri v. Heffernan*, 13 Johns. R. 58, 77. Smith on Merc. Law, 78, 79. *Johnson v. Ogilby*, 3 P. Will. 277. 2 Kent, Comm. Lect. 41, p. 629, 630, 3 ed. *Rathbone v. Budlong*, 15 Johns. R. 1. *Meyer v. Barker*, 6 Binn. 234. *Waring v. Cox*, 1 Miller, Louia. R. 198. *Thompson v. Davenport*, 9 B. & Cressw. 78. See also Mr. Smith's able note to this case, in his Leading Cases, vol. 2, p. 222 to 227. *Thomas's Ex'r v. Edwards*, 2 Mees. & Welsb. 215. *Krumbhaar v. Ludeling*, 3 Miller, Louia. R. 642. *La Farge v. Ripley*, 16 Martin, R. 308. *Waring v. Cox*, 1 Miller, Louia. R. 200. *Zacharie v. Nash*, 13 Louia. R. 21. Smith on Merc. Law, p. 140, 3d ed. 1843. *Campbell v. Baker*, 2 Watts, R. 33. Mr. Chancellor Kent, in his learned Commentaries, uses the following language ;—" It is a general rule, standing on strong foundations, and pervading every system of jurisprudence, that, where an agent is duly constituted, and names his principal, and contracts in his name, the principal is responsible, and not the agent." 2 Kent, Comm. Lect. 41, p. 629, 630, 4th ed. Story on Agency, § 154, 155. But it may be generally stated that an agent makes himself personally responsible to third persons :—

1. Whenever he does any act without authority from his principal ; Story on Agency, § 264, *et seq.* ; Paley on Agency, by Lloyd, 386, 387. *Polhill v. Walter*, 3 B. & Adolph. 114. *Parrot v. Wells*, 2 Vern. R. 127. Bayley on Bills, ch. 2, § 7, 5th ed. 3 Chitty on Comm. and Manuf. 212. 2 Liverm. on Agency, 255, 256, ed. 1818. *Sumner v. Williams*, 8 Mass. R. 178. *Bowen v. Morris*, 2 Taunt. 385, 386. *East India Co. v. Hensley*, 1 Esp. R. 112. Smith on Merc. Law, 79, 80, 2d ed. 2 Kent, Comm. Lect. 41, p. 629 to 632, 4th ed. *Johnson v. Ogilby*, 3 P. Will. 278, 279. *Meech v. Smith*, 7 Wend. 315. *Dusenbury v. Ellis*, 3 Johns. Cas. 70 ; per Lord Holt, in Holt's Rep. 309. See *Woodes v. Dennett*, 9 N. Hamp. R. 55. (Even though under the belief that he possesses such authority ; *Smout v. Ilbery*, 10 Mees. & Welsb. 1, 9, 10.)

2. Where at the time of making the contract, the agency is not revealed ; Story on Agency, § 266, *et seq.* *Owen v. Gooch*, 2 Esp. R. 567. *Ex parte Hartop*, 12 Ves. 352. *Patterson v. Gandesequi*, 15 East, 62, 68. 3 Chitty on Comm. and Manuf. 211. *Mauri v. Heffernan*, 13 Johns. 58, 77. 2 Liverm. on Agency, 245-247, 257, ed. 1818. 2 Kent, Comm. Lect. 41, p. 630, 631, 4th ed. *Stackpole v. Arnold*, 11 Mass. R. 27. *James v. Bixby*, 11 Mass. R. 34, 37, 38. *Bedford v. Jacobs*, 16 Martin R. 530. *Brockway v. Allen*, 17 Wend. 40, 43. 2 Kent, Comm. Lect. 41, p. 629, 631, 4th ed. *Hyde v. Wolf*, 4 Miller, Louia. R. 234. *Taintor v. Prendergast*, 3 Hill, R. 72. *Corlies v. Widdelfeld*, 6 Cowen, 181. *Rathbon v. Budlong*, 15 Johns.

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return the bill or pay the amount, although acting gratuitously, he was still bound, according to the authorities on this

R. 1. *Waring v. Mason*, 18 Wend. 425. *Mills v. Hunt*, 20 Wend. 431. *Raymond v. Crown & Eagle Mills*, 2 Metcalf, R. 319. Smith on Merc. Law, p. 134, 135, 140, 141, 3d ed. 1843. *Upton v. Gray*, 2 Greenl. R. 373. *Keen v. Sprague*, 3 Greenl. R. 77. *Parker v. Donaldson*, 2 Watts & Serg. 9;—and the name of his principal made known. Story on Agency, § 267. Paley on Agency, by Lloyd, 372, 373. 3 Chitty on Comm. and Manuf. 211. *Pater-son v. Gandasequi*, 15 East R. 62, 68, 69. *Ex parte Hartop*, 12 Ves. 352. Smith on Merc. Law, 78, 79, 2d ed. Id. ch. 5, § 5, p. 134–136, 140, 141, 3d ed. 1843. *Thomson v. Davenport*, 9 B. & Cressw. 78, 88, *Bedford v. Jacobs*, 4 Miller, Louis. R. 528. *Beebe v. Roberts*, 12 Wend. 413. 2 Kent, Comm. Lect. 41, p. 629–631, 4th ed.

3. Where the principal resides in a foreign country. Story on Agency, § 268. Paley on Agency, by Lloyd, 248, 373, 382. Buller, N. P. 130. *De Gaillon v. L'Aigle*, 1 Bos. & Pull. 368. *Pater-son v. Gandasequi*, 15 East, R. 62. *Thomson v. Davenport*, 9 Barn. & Cressw. 78. Smith on Merc. Law, 76, 78, 2d ed. Id. ch. 5, § 5, p. 134–136, 140, 141, 3d ed. 1843, 2 Liverm. on Agency, 249, ed. 1818. *Stackpole v. Arnold*, 11 Mass. R. 27. *Bradlee v. Boston Glass Manufactory*, 16 Pick. 347, 350. But the presumption that the agent is personally liable in this case may be rebutted by proof of any usage or agreement to the contrary. See *Kirkpatrick v. Stainer*, 22 Wend. 244. *Taintor v. Prendergast*, 3 Hill, 72, 73.

4. Where the agent makes the contract in his own name or voluntarily incurs a personal responsibility, either express or implied. Story on Agency, § 269. Id. § 147, 154, 156 to 159. 1 Stair, Inst. by Brodie, B. 1, tit. 12, § 16. 3 Chitty on Comm. and Manuf. 211. 2 Kent, Comm. Lect. 41, p. 630, 4th ed. Id. 631. *Jones v. Littledale*, 6 Adolph. & Ellis, 486, 490. *Hopkins v. Mehaffey*, 11 Serg. & Rawle, 129. *Burrell v. Jones*, 3 Barn. & Cressw. 160. *Ireson v. Conington*, 1 Barn. & Cressw. 160. *Magee v. Atkinson*, 2 Mees. & Welsb. 440. *Seaver v. Hawkes*, 5 Moore & Payne, 649. *Kirkpatrick v. Stainer*, 22 Wend. 244, 254, 255. *Taintor v. Prendergast*, 3 Hill, R. 72. *Simonds v. Herd*, 23 Pick. 121. *Higgins v. Senior*, 8 Mees. & Welsb. 834, 845. *Mills v. Hunt*, 20 Wend. 431. *Newhall v. Dunlap*, 2 Shepley, R. 180. *Waring v. Mason*, 18 Wend. 425. *Collins v. Butts*, 10 Wend. 399.

5. In special cases where the policy of the law demands that an agent who has done or refused to do a particular act, shall be liable. As where one pays money to an agent for the use of his principal and afterwards becomes entitled to recall it, “he may, upon notice to the agent, recall it, provided the agent has not paid it over to his principal, and also provided no change has taken place in the situation of the agent, since the payment to him, before such notice. Paley on Agency, by Lloyd, 388 to 394. 3 Chitty on Comm. and Manuf. 313. 2 Liverm. on Agency, 260, 261, ed. 1818. *Cox v. Prentice*, 3 M. & Selw. 344. *Hearsay v. Pruyn*, 7 Johns. R. 179. *Mowatt v.*

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subject, and the reason of the thing, to use a *due diligence and attention, adequate to the trust imposed in him, to perform his engagement with good faith, and neither do nor omit any thing which the nature of the trust required.* In the present case, the award, by which the bill was allowed

M'Lellan, 1 Wend. 173. The mere fact, that the agent has passed such money in account with his principal, or that he has made a rest in his accounts, without any new credit being given to the principal, will not of itself be sufficient to entitle the agent to retain the money, when the party, entitled to recall it, demands it. 3 Chitty on Comm. and Manuf. 313. Paley on Agency, by Lloyd, 388, 389. 2 Liverm. on Agency. 264, ed. 1818. *Buller v. Harrison*, Cowp. R. 565. *Cox v. Prentice*, 3 M. & Selw. 344. But, if a new credit has been given to the principal since the payment, or if bills have been accepted, or if advances have been made, on the footing of it, the payment cannot be recalled. 3 Chitty on Comm. and Manuf. 313. *Buller v. Harrison*, Cowp. 565. Paley on Agency, by Lloyd, 388, 389. 2 Liverm. on Agency, 264-266, ed. 1818. *Mowatt v. M'Lellan*, 1 Wend. 173. *A fortiori*, if the money has been paid over to the principal before notice of the recall, the agent will not be liable, unless, indeed, the receipt of the money by the agent was obviously fraudulent and illegal, or his authority to receive it was known to himself to be utterly void. 3 Chitty on Comm. and Manuf. 313. *Cary v. Webster*, 1 Str. 408. *Campbell v. Hall*, Cowp. R. 204. *Edwards v. Hodding*, 5 Taunt. 515. *Snowden v. Davis*, 1 Taunt. R. 359. *Ripley v. Gelston*, 9 Johns. R. 201. Smith on Merc. Law, 80-81, 2d ed. Id. p. 143, 144, 3d ed. 1843. *Buller v. Harrison*, Cowp. R. 565. Paley on Agency, by Lloyd, 388-390. *Seidell v. Peckworth*, 10 Serg. & R. 442. *Frye v. Lockwood*, 4 Cowen, 454. Various examples might be put to illustrate this doctrine. Thus, where money has been paid to an agent to avoid an illegal distress, or an illegal claim; as, to the bailiff of a sheriff, to avoid an illegal distress; or, where money has been paid to a collector for an illegal duty, and notice of the objection is given to the agent, or collector, before he pays it over; the party, paying it, may recover it back from the agent, or collector, notwithstanding he has since paid it over to the principal. *Snowden v. Davis*, 1 Taunt. R. 359. *Edwards v. Hodding*, 5 Taunt. R. 815. *Ripley v. Gelston*, 9 Johns. R. 201. *Bank of U. States v. Bank of Washington*, 6 Peters, R. 8, 19. *Tracy v. Swartwout*, 10 Peters, R. 80. *Elliott v. Swartwout*, 10 Peters, R. 137. *Frye v. Lockwood*, 4 Cowen, 454. 2 Liverm. on Agency, 262-264, ed. 1818. Smith on Merc. Law, 82, 2d ed. Id. Pt. 1, ch. 5, § 7, p. 143-145, 3d ed. 1843. *Bend v. Hoyt*, 13 Peters, R. 263. *Allen v. M'Keen*, 1 Sumner, R. 277, 278, 317. *Miller v. Aris*, 3 Esp. R. 231. S. C. cited Selwyn's Nisi Prius, 93, 8th ed. Paley on Agency, by Lloyd, 393, 394. But, if the illegality is unknown to the agent, and no objection of that sort is made before he has paid over the money, he will not be liable therefor.' This subject is elaborately discussed and the principal cases are reviewed in Judge Story's work on Agency, 2d ed. 310-381, to which the reader is respectfully referred.

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to Greenleaf, was made on the 30th of March, 1796, and substantially performed by Downing on the 20th of April following, and this performance made to the defendant himself as the agent of Greenleaf, who then also fulfilled the award on the part of Greenleaf. The defendant, therefore, at that time, knew that the bill was satisfied, and he informed Downing that he would pay the amount to the plaintiffs. If he was not liable to pay it himself, Greenleaf, undoubtedly was, and he ought, at least, to have given notice to the plaintiffs of its allowance to Greenleaf, and of their right to demand it of him. But instead of doing this, he continually kept them ignorant of its real situation, told them it was still in the hands of the arbitrators to be recovered, and amused them by sending for it to enable them to proceed in the suit against Flint. This conduct, considered as an omission of duty merely, was inconsistent with ordinary diligence and fidelity to the interest of the plaintiffs, and to the trust reposed in the defendant, and, in contemplation of law, it was *gross neglect*. If we add to this, his actually receiving the whole of the property awarded to Greenleaf, his paying the whole of the money awarded to Downing, and informing him that he should pay this bill to the plaintiffs, and his afterwards *paying or *advancing* 140 dollars of it on ac- [*97] count, the circumstances are sufficient to raise a presumption, that he was possessed of the means, either from Greenleaf, or from the property received in pursuance of the award, to discharge the bill, and that he ought in good faith to have done it.

The cause, during the last trial, has probably received all the light which can be thrown upon it, and the present verdict appears to be according to the justice and equity of the case. To permit the cause to be again agitated would answer no good purpose. We think, therefore, that the verdict ought not to be disturbed, and that judgment must be entered for the plaintiffs.

Judgment for the plaintiffs.

Rickets v. Livingston.

RICKETS AND WIFE *against* LIVINGSTON, Executor, &c.

In an action brought by A. against an executor for a legacy, the defendant offered in evidence an account, and certain bonds which had been paid and cancelled by the testator, on which there was an indorsement by the testator, that by agreement between A. and B. they were to be charged to the account of A. and the bonds were for that reason cancelled. The indorsement was prior to the date of the will. It was held that the account, and indorsement made on the bonds, were not sufficient evidence to support the debt set up against A. by the executor. And that if the debt had been proved, it would not have been released or extinguished by the legacy.

THIS was an action of debt, upon the statute, (24 sess. c. 174, s. 7,) for a legacy, due to the wife of the plaintiff, as residuary legatee, under the will of P. V. B. Livingston, deceased. *Plea nil debet.*

The cause was tried, at the March circuit, before Mr. Justice *Kent*. The demand of the legacy was proved. The defendant, in support of his right to retain, offered to prove, that the testator married the mother of the plaintiff, who was the widow of William Rickets, deceased, and that a large account was entered in the testator's books against John Rickets, the plaintiff's brother, comprising among [*98] "other things, the amount of several bonds, and other articles, paid for the account of the family of William Rickets, and among the rest, to the plaintiff, for which a balance was due to the testator, on the 2d July, 1784, of 609*l.* 6*s.* 11*d.*

The four bonds mentioned in the account, were also offered in evidence. One of them was given to the testator, and the other three were paid and taken up by him. On each of the bonds was the following indorsement, in the hand writing of the testator. "1791, November 17. Upon the settlement of Jacob Rickets and James Rickets, the within bond charged in my account, is to be paid by James Rickets, that is to say, the whole balance of my account due to me. I therefore gave the said bond to be cancelled, which was done in my presence, by tearing off the seals."

This evidence was rejected by the judge, and a verdict

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was taken for the plaintiff, subject to the opinion of the court, as to the admissibility and effect of the evidence.

Hamilton, for the plaintiff.

Troup and Harison, for the defendant.

RADCLIFF, J. This is an action of debt for a legacy, bequeathed by the defendant's testator to Sarah Rickets, one of the plaintiffs. The plea is *nil debet*, and the defendant insists on the right to retain the legacy, or a part of it, in satisfaction of the debt claimed to be due from the plaintiff, James Rickets, to the testator.

Two questions arise :

1. If such debt did exist, was it not released or extinguished by the subsequent will of the testator ?

2. If not, whether there is sufficient proof of the debt ?

1. If the debt did exist against the present plaintiff, James Rickets, the subsequent legacy to Sarah Rickets did not extinguish it. A legacy to one who, at the date of the will, is indebted to the testator, does not release or extinguish the debt, unless it appears to be so intended, on the [*99] face of the will. It remains subject to the residuary, or other dispositions of the will, and if not disposed of, will be decreed to the next of kin. In the case of *Brown v. Selwyn*, 3 Bro. C. C. 110, (Temp. Talbot, 240,) there was parol proof that the testator intended the debt should be released, which was rejected. The legacy to Sarah Rickets, in the present case, is expressed in the same terms, as the legacies given to the other daughters, being "in addition" to what he had already given them. There can, therefore, be no inference from this mode of expression, in favor of this particular legacy. It would rather seem, that the testator meant to place all his daughters on the same footing ; and if he had a different intention with respect to this debt, it is probable he would so have expressed it. The clause in the will, requiring his son Philip to account for the moneys with which he stood charged in his books, deducting what he had paid for his son William, can have no influence on this question. It might require a different arrangement, and it does not appear that he stands, under the will, on the same footing with the

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daughters. If therefore, the debt did exist, it cannot be considered as affected, or extinguished by the will. But,

2. I think there is not sufficient evidence to establish the debt. Originally, it was not a debt of either of the plaintiffs. The only evidence that it was assumed by James Rickets, arises from the indorsements on the bonds, in the hand-writing of the testator. There is no other trace of the demand. It is not entered in his books, nor does it appear to have been afterwards claimed by him, or acknowledged by J. Rickets. The will is *subsequent, in date*, and takes no notice of it. This, although not a positive release or bar to its recovery, is still a circumstance to weigh in the scale of presumptions. James Rickets was married to a daughter of the testator, and the latter survived the transaction for several years. If the debt ever existed, or was intended to remain a charge against

James Rickets, it is probable that something farther [*100] on the part of the testator, at least, would have appeared. On the whole, the circumstances are too loose and uncertain to be admitted as proof of the debts.

Proceeding on this ground, it is unnecessary to decide whether in any, and in what cases, the acts of the testator may be received as evidence of a demand against his legatee. I think there may be cases in which it would be proper. The objections on the ground of interest do not apply, as in ordinary cases. The relation between a testator and his legatee, is not the same as that which usually exists between parties litigating adverse claims, and, therefore, may admit of a greater latitude of proof. But the acts of a testator, thus to affect a legatee, ought always to be express and unequivocal, and not liable to doubtful or uncertain construction. They are not so in the present case.

If the transfer of the debt, in the manner alleged, had been satisfactorily proved, I think there would be a sufficient consideration to support the *assumpsit*, on the part of J. Rickets. By cancelling the bonds due from other persons, the testator destroyed his right of action, and was deprived of his remedy against them, and an injury or deprivation of right to one party, as well as a benefit to the other, is equally a good con-

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sideration for a promise. For the want of this proof, I am of opinion, that the set-off cannot be allowed, and the plaintiff must have judgment.

BENSON, J. and LEWIS, J. were of the same opinion.

KENT, J. The evidence having been refused at the trial, the question is, now, whether it was competent proof?

It is an established rule, in the court of equity, that if a testator grant a legacy to his debtor, the debt is not thereby released, and that if a legatee sue for his legacy, the executor may deduct from his legacy the amount of the debt. (Mosely, 300. Cas. temp. Talbot, 240. 3 Bro. C. C. 110.) But the indorsement on the bonds, cannot be regarded as a debt, or as evidence of any assumption by the plaintiff. The plaintiff had no interest or concern in [*101] the bonds, and no other charge or demand appears to have existed against him. The act of the testator, in making the indorsements, is no foundation for a suit against the plaintiff, at law or in equity. Shall it therefore go to defeat or impair the legacy?

The general disposition of the equity courts, is in favor of the efficacy and absolute nature of legacies. A legacy naturally implies bounty or benevolence, and it is, *prima facie*, to be presumed absolute. (Mosely, 300. 3 Atkyns, 97. 1 Brown's Civil Law, 304.) The courts, accordingly, lean against considering a legacy as payment, even of a debt, for as far as a legacy is applied to pay a debt, so far it is no legacy. It is making it a payment, instead of a gift. (1 P. Wms. 299, 408. 1 Salk. 155. 3 Woodd. 538. 1 Bro. C. C. 129. 2 Fonb. 320.) It is with the like disposition, that the rule has been adopted, that where the same sum is repeated to a legatee in a codicil, that was in the will, he shall *prima facie*, be entitled to both sums. (1 Bro. C. C. 391, 2 H. Black. 213. 1 Vesey, jun. 472. 1 Brown's Civil Law, 304.)

In the present case, if the indorsements be admitted as a competent set-off against the legacy, it will be rendering the legacy no legacy, to the amount of the indorsements. To

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place this objection in a stronger light: Suppose A. gives 1000 dollars to B. by will, and when B. comes to demand the gift, the executor, to repel it, produces a memorandum in the hand-writing of A. found among his papers, charging B. with a debt of 1000 dollars. If that memorandum was to be considered as competent to extinguish the legacy, B. might well say, the legacy was *vox et preterea nihil*. Without the legacy, the memorandum was a nullity. With the memorandum, the legacy becomes null. B. is left in the same state, exactly, as if no will had been made. This is certainly repugnant to the ancient and sound maxims of interpretation. *Verba debent intelligi cum effectu. Utile per inutile non vitiatur.*

[*102] *The position is altogether new, that a demand, valid in law, can be repelled by a counter demand which cannot support a suit, either at law or in equity.

The rational doctrine of set-off, was introduced from the civil law, to prevent circuity of action, and not to give efficacy to claims which had none before.

The indorsements on the bonds have no connection with the will, and cannot therefore be reached by the rule, that one declaration or act is to be construed or explained by another.

Nor do I see that it will tend to promote truth or justice, to admit the naked declarations of a testator, in a case totally detached from his will, and which would otherwise be of no avail or consideration in law, to defeat or control the provisions of an instrument, which the law has generally taken care to secure, by very minute regulations. I am of opinion, therefore, that the evidence offered was incompetent.

LANSING, Ch. J. not having heard the argument in the cause, gave no opinion.

Judgment for the plaintiffs.(a)

(a) "Where a man is indebted, either in the common way, to a stranger; or to a wife, on account of having retained her pin-money; a child, on account of having received and retained his legacy; a servant, for wages; or as executor or trustee, or for an annuity, &c. In such and the like cases, if the debtor bequeath a legacy to his creditor, in a sum equal to, or greater

Brooks v. Patterson.

BROOKS *against* PATTERSON.(b)

An attorney of this court who had ceased to practice for a year, and had entered the army of the United States, was held to have lost his privilege.

THIS was an action of *assumpsit*. The declaration was on a promissory note made by the defendant.

The defendant pleaded, that at the time of exhibiting the bill, he was one of the attorneys of thi cour , and is still an acting attorney, and that attorneys are not, by custom, to answer any bill exhibited against them, as in custody of

than the debt, and full as beneficial in other respects, it shall, if no contrary intention appear, be presumed to be given in satisfaction of the debt. Under what circumstances this presumption will arise, see Math. Pres. Ev. 108, *et seq.* 2 Story's Eq. 378. See also *Williams v. Crary*, 5 Cowen, 368. 4 Wend. 443. S. C. *Massey v. Leaming*, 4 Dall. 123. *Owings' ex'rs v. Owings*, 1 Harr. & Gill, 484. *Ladson v. Ward*, 1 Des. Eq. R. 314. *Guignard v. Meyrant*, 4 id. 614. *Scott's ex'r v. Osborne's ex'r*, 2 Munf. 413. *Strong v. Williams*, 12 Mam. R. 390. *Byrne v. Byrne*, 3 Serg. & Rawle, 54, 60. *Mulheran's ex'rs v. Gillespie*, 12 Wend. 349. *Keely v. Keely's ex'rs*, 6 Rand. 176. *Clarke v. Bogardus*, 12 Wend. 67. *Rickets v. Livingston*, 2 Johns. Cas. 98. *Foster v. Evans*, 6 Sim. 15. *Scott's ex'r v. Osborne's ex'r*, 2 Munf. 413. With regard to parol evidence in elucidation of the testator's intention, it seems now to be fully established, notwithstanding Lord Talbot's objection in *Fowler v. Fowler*, 3 P. Wms. 354, that such evidence is alike admissible, for the purpose of repelling, or, when contradicted, of corroborating the legal implication. *Cuthbert v. Peacock*, 2 Vern. 593; 1 Salk. 155, S. C. *Pole v. Lord Somers*, 6 Ves. 324-6. *Wallace v. Lord Pomfret*, 11 id. 542, 547, *et seq.* And see the cases *supra*, pl. 5, as to parol evidence on the subject of purchases, devises, &c.; in performance or satisfaction of covenants in family settlements, &c.; also *Williams v. Crary*, 4 Wend. 443. In the case last cited, the supreme court of New York went not only the length of the English cases, in receiving parol evidence as to all the extrinsic circumstances calculated to raise the presumption; but they appear to have received and acted upon evidence of a conversation between the testator and the legatee, to raise the presumption in the first instance. 4 Wend. 449 to 452. See also *Clarke v. Bogardus*, 12 Wend. 67. The doctrine of the constructive satisfaction of a debt, by advancing a marriage portion to the creditor, seems to depend on the same principle. *Chidley v. Lee*, Prec. Cha. 228, overruled in *McDowell v. Halfpenny*, 2 Vern. 484. *Wood v. Briant*, 2 Atk. 521, 522. *Seed v. Bradford*, 1 Ves. sen. 501, *Chave v. Farrant*, 18 Ves. 8." Cowen & Hill's Notes to 1 Phill. Ev. 1493.

(b) S. C., C. C. 133.

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the sheriff, but only to bills exhibited against them, [103] *as attorneys, and concluded by praying judgment, if he ought to answer.

The plaintiff replied, that the defendant had, for one year before exhibiting the bill, &c. ceased to practice as an attorney, and for that time had been, and yet was, a captain in the army of the United States. To this replication there was a demurrer and joinder.

Munro, for the plaintiff.

Riker, for the defendant.

Per Curiam. If an attorney ceases to practice for a year, not in consequence of any temporary absence or avocation, but by betaking himself to a profession or business, incompatible with his practice as an attorney, the reason of his privilege ceases. Attendance is the ground and foundation of the privilege. The object is, that attorneys may not be drawn into other courts, or to other business, to the injury of the suitors. (See 2 Wils. 231, 232. 4 Burr. 2113, &c. 1 Vent. 1. 2 Lutw. 1664.) The privilege is that of the court, for the sake of public justice, and is not intended as an accommodation to the individual. Here it appears upon the record, that the defendant had become an officer in the army, and had ceased to practice for a year.

It would be inconvenient, and an abuse of the end of privilege, to allow it in this case, notwithstanding the name of the defendant still remains on the rolls of the court.

We are of opinion, therefore, that judgment must be rendered for the plaintiff.

Judgment for the plaintiff.(a)

(a) Grah. Prac. 2d ed. 38. In *Ogden v. Hughes*, 2 Southard, 718, it was decided that an attorney is privileged from arrest, unless his privilege be taken away by rule, though he do not show that he has acted as attorney within a year. See however, 3 Cowen, 22.

*PHILIPS *against* PECK.(a) [*104]

Where the demandant in a real action, enters into a stipulation to try the cause, or be nonsuited, he must pay the costs of the last circuit or sittings, in the same manner as plaintiffs in other causes, for not proceeding to trial.

In cases where relief is discretionary, the court may impose costs, and in such cases these do not depend on any statute, but upon the equity and discretion of the court.

THIS was an action on a *writ of right*. The tenant moved the usual rule against the demandant, for judgment as in cases of nonsuit, for not proceeding to trial, at the last circuit. The demandant entered into the usual stipulation, and the question was, whether he should pay the costs of the circuit.

Harrison, for the demandant.

P. W. Radcliff, for the tenant.

Per Curiam. It is a long established rule of law, that the demandant, in a real action, neither recovers, nor pays costs, because he recovers no damages; (10 Co. 116; 1 H. Bl. 11, 12; 7 Term Rep. 268;) and therefore, although he is liable to judgment, as in cases of nonsuit, for not proceeding to trial, yet in that case, he pays no costs, because the act only gives costs in cases where the plaintiff, upon nonsuit, would be entitled to them. (2 Black. Rep. 1093; 1 B. & P. 104.) But, in many cases, the courts interpose and relieve upon certain terms, which they, in their discretion, may impose. One of these usual terms, is the payment of costs. Costs, in such cases, do not depend upon any statute, but upon the equity and discretion of the court.

Putting off a trial, for the absence of a witness, is an instance of costs being imposed, as a consideration of the rule, (1 Salk. 38,) and no doubt, a tenant, in a writ of right would be obliged to comply with the consideration, as he is, equally with any other defendant, within the equity of the rule. The case of amendments, (2 Crompt. 458,) may be mentioned

(a) S. C., C. C. 112.

 Campbell v. Grove.

as another instance of costs being imposed, as a condition of the favor, and to which the party applying must conform whether he be party to a real or personal action.

The present case is of a similar kind. It is not long since, that the court adopted the rule not to nonsuit for the first default, in not proceeding to trial, according to the [*105] *course of the court, provided, the plaintiff would stipulate to try the cause at the next circuit, or be nonsuited. (See 2 H. Bl. 119. 1 Bos. & Pull. 38.)

But the payment of costs, for not proceeding to trial, was very soon added, as an equitable condition of the indulgence until another circuit; and the payment of costs, for the default at the preceding circuit, and of the motion, is now considered as a matter of course.

We are of opinion therefore, that the demandant can only be admitted to his stipulation, upon the usual terms of payment of costs; and that he ought to pay them, otherwise judgment may be entered against him, as in cases of nonsuit, *nunc pro tunc*.

 CAMPBELL, Assignee, &c. against GROVE.(a)

Where a party agreed to stay proceedings in a bail-bond suit, on payment of costs, the original suit having been settled, and the defendant neglecting to pay the costs, the plaintiff proceeded in the bail-bond suit, the court refused to set aside the proceedings, as the plaintiff had no other way to obtain his costs.

Counter affidavits may be read to oppose a motion, though copies have not been served.

But supplementary affidavits, in support of a motion, cannot be read.

TEN BROECK moved to set aside the proceedings on the bail-bond in this cause, on the ground that the plaintiff had settled with the defendant in the original cause, before the commencement of this suit, and had directed the attorney

(a) S. C., C. C. 113.

 Jackson v. Vischer.

to stay proceedings, but who had, notwithstanding, proceeded.

Emott produced counter affidavits, which were objected to, because the defendant had not been made acquainted with their contents, previous to their being read in court, but the objection was overruled. It appear that the original cause was commenced in July vacation, 1797; that in November, an accommodation was made between the parties, and the plaintiff then directed the proceedings to be stayed, on payment of costs. The costs remaining unpaid, a suit was instituted on the bail-bond, in April vacation, 1799, [*106] and the defendant put in a plea of *non est factum*, in October vacation following.

Ten Broeck, in reply, offered counter-supplementary affidavits, but *the Court* would not suffer them to be read; observing, that a party can never support his motion by any affidavits but those on which he originally grounds it.

Per Curiam. The defendant must take nothing by his motion. The attorney had no other way of compelling the payment of his costs, than by the suit on the bail-bond. Besides, the defendant has suffered such a length of time to elapse, that we would not now relieve, if there had been originally just grounds for such interference.

Rule refused.(a)

JACKSON, *ex dem.* VAN ALLEN, *against* VISCHER and others.

In ejectment, the tenant must plead at the time he signs the consent rule. A default for want of a plea, must be entered against the *casual ejector*, not the tenant.

TEN BROECK moved to set aside a default entered against the *tenant* for not pleading.

(a) *Grah. Prac.* 2d ed. 678. *Bergen et al. v. Boerum*, 3 *Calnes*, 256. *Clark v. Frost*, 3 *id.* 125. *Wilcox v. Howland*, 6 *Cowen*, 576.

In re Cascaden.

It appeared that the consent rules were entered into, and a new declaration delivered, but no plea having been filed, a judgment was entered by default against the *tenant*.

Emott, contra.

Per Curiam. Although at the time of signing the rule, the plea ought to have been put in, yet the entering [107] the default "in this manner was improper. It should have been against the *casual ejector*, according to the terms of the consent rule. There can be no judgment by default against the *tenant*.

Rule granted.(a)

In the Matter of CASCADEN, an Absconding Debtor.(b)

The trustees of an absent or absconding debtor, may be compelled to account on the motion of the debtor, as well as of the creditors.

METCALF, in behalf of the *debtor*, moved that the trustees be laid under a rule to report within eight days.

Per Curiam. The debtor, as well as his creditors, has an interest in the account, to be rendered by his trustees, and they are to account on the application of the debtor, or creditors. The chief justice having reported the proceedings before him, the court is in possession of the cause.

Let there be a rule that the trustees report within eight days after service of a copy of such rule.(c)

(a) *Grab. Prac.* 2d ed. 222, *et seq.*

(b) S. C., C. C. 116.

(c) The trustees are considered as the agents of all parties. *Cox v. Pierce*, 7 Johns, 298.

 Van Patten v. Ouderkirk.

GORHAM *against* LANSING AND DOE.

If a party wants time to plead, he must apply to a judge for that purpose. In an application to set aside a default for not pleading, bail are not entitled to any peculiar indulgence.

Foot moved to set aside the default entered in this cause, upon an affidavit of merits, and that the omission to plead was occasioned by urgent business. He stated that it was a case of bail, and was therefore to be considered as one which was entitled to the grace of the court.

Lush, contra, read counter-affidavits, as to the merits.

**Per Curiam.* If a party wants more time to [*108] plead, he must apply to a judge, at his chambers, to enlarge the rule. This, is stated to be an application in favor of bail, but it should be remembered, that the cases of bail to which the court are particularly indulgent, are where bail wants time to surrender the principal, but here he comes to defend the suit, and therefore stands in the same situation with any other defendant.

Motion denied.

VAN PATTEN *against* OUDERKIRK.(a)

A justice cannot move to quash a *certiorari* directed to him. He must obey it at his peril; and return what is legally required of him, and take no notice of what he is not bound by law to return.

ON *certiorari*, from a justice's court.

Emott, in behalf of the justice, moved to quash the writ, because it required him, among other things, *to return the testimony*. It was admitted that no notice had been given to the opposite party, but it was contended that none was necessary.

(a) S. C., C. C. 118.

Pfister v. Gillespie.

Per Curiam. This writ is the right of the party who takes it out, and the justice is bound to obey it, at his peril. If he is not a party, it does not lie with him to move that the writ should be quashed. He is not however bound to return any thing, but what can *legally* be required of him, notwithstanding the command expressed in the writ. In this case he ought to return all but the testimony; he need take no notice of that part of the precept which enjoins him to return that.

Rule refused.

[*109] *PFISTER AND M'COMB *against* GILLESPIE.(a)

The attorney is not bound to file security for costs, where one of the plaintiffs resides in the state, though he may be insolvent.

PENDLETON, in behalf of the defendant, moved that the plaintiffs file security for costs, before they be allowed to proceed in the suit. He read an affidavit, stating that one of the plaintiffs had removed to New Jersey, since the commencement of the suit, and that the other was confined in jail for debt; and further, that the defendant was informed and believed, that the cause of action was assigned.

B. Livingston, contra.

Per Curiam. It is sufficient that one of the plaintiffs resides within the reach of the process of the court; we can take no notice whether he is insolvent or not. And as to the assignment, the defendant has nothing to do with it. (1 H. Bl. 106. 2 H. Bl. 27.)

Motion denied.(b)

(a) S. C. C. C. 119.

(b) By the Revised Statutes of New York, when a suit shall be commenced in any court, 1. for a plaintiff not residing within the jurisdiction of such court, or for several plaintiffs, who are all non-resident: or, 2. for, or in the name of, the trustees of any debtor: or 3. for, or in the name of any person being insolvent, who shall have been discharged from his debts, or whose person shall have been exonerated from imprisonment pursuant to any law, for the

 Andrews v. Andrews.

ANDREWS against ANDREWS.(a)

Where a witness refuses to obey a *subpœna*, which has been regularly served upon him, the court will grant an attachment against him, in the first instance.

TEN BROECK moved for an attachment absolute against a witness, on an affidavit that he was regularly summoned, and money tendered him for his expenses, which he did not object to for its insufficiency, but positively refused to attend.

**Per Curiam*. Here is a strong case of palpable [*110] contempt, and, therefore, the court will award an attachment in the first instance. (1 Str. 1150. 1 Hen. Black. 49.) The sum of money tendered may, or may not, have been adequate, but as the witness did not object to it, at the time, it is to be considered sufficient.

Rule granted.(b)

collection of any debt, contracted before the assignment of his estate: or 4. for, or in the name of any person committed in execution for a crime: or 5. in the name of any infant, whose next friend has not given security for costs, the defendant may require such plaintiff, to file security for the payment of the costs that may be incurred by the defendant, in such suit or proceeding; 2 Rev. Stat. 620, sec. 1; and if, after the commencement of a suit, the plaintiff shall become a non-resident, or all the plaintiffs shall become non-resident or insolvent, and be discharged or exonerated as aforesaid, or be sentenced to the state prison for any term, less than for life, the defendant may require such security to be filed. Ibid. sec. 2. See Grah. Prac. 2d ed. 505, *et seq.*; also 1 U. S. Digest, tit. Costs, VIII.

(a) S. C., C. C. 119.

(b) In New York and Virginia, it has been decided that if a witness merely *disobey* a *subpœna*, the court will in the first instance grant a rule to show cause, &c. *Jackson v. Munn*, 2 Caines, 92. *Morris v. Creel*, 1 Vir. Cas. 333. If however the witness refuses to obey the *subpœna*, the court will proceed at once by attachment. *Principal Case*. The U. S. North. Dist. Court follows the New York practice. Conkling's Pr. 265. Cowen & Hill's Notes to 1 Phill. Ev. 24. But to authorize an attachment the *subpœna* must have been strictly served. *State v. Trumbull*, 1 Southard, 139. *United States v. Caldwell*, 2 Dallas, 334; (unless the witness by his act has dispensed with such service; *Ferri v. Strome*, 1 Yeates, 303;) upon a material witness; *Trial of Smith and Ogden*; (though this will be inferred unless circumstances raise a

Jackson v. Woodward.

JACKSON, *ex dem.* QUACKENBOSS, against WOODWARD.(c)

In ejectment, signing the consent rules, delivering a new declaration, putting in common bail and filing a plea are all simultaneous acts. And if the tenant neglects to file the plea *instantly*, default may be entered against the *casual ejector*.

It appeared that the plaintiff's attorney, at the time of delivering a new declaration, after the consent rules were exchanged, not having received a plea, entered a rule in the cause against the *tenant*, to plead in twenty days; which not being done, he proceeded to enter a default against the *casual ejector*.

Emott now moved to set aside this default, for irregularity.

Quackenboss, contra.

Per Curiam. The entry of the default in this manner, was certainly irregular. No rule could be entered against the *casual ejector*, in a cause entitled against the *tenant*. The signing the consent rule, delivering a new declaration, putting in common bail, and filing a plea, are all simultaneous acts; should the tenant, therefore, neglect to file his plea, *instantly*, he is to be considered as not appearing in the suit, and then a default is to be entered against the *casual ejector*. But the default against the *casual ejector* has been taken under the first rule at the return of the writ, and not in consequence of any new rule.

Rule granted.(d)

presumption to the contrary, in which case the court will require an affidavit. *Trial of Smith and Ogden.*)

The object of the attachment is not the redress of the party injured; *State v. Nixon, Wright*, 763; but solely the punishment of the contempt, *id.* Where therefore it appeared that witnesses, against whom an attachment had issued for disobedience to a subpoena, had been so much indisposed as to be incapable of attending, they were discharged, and the costs of the attachment directed to abide the event of the suit. *Butcher v. Coats*, 1 Dall. 340. See also *Grah. Prac.* 2d ed. 267. *Cowen & Hill's Notes*, *ut sup.*

(c) S. C., C. C. 120.

(d) See *Tillinghast's Adams on Ejectment*, *Hogan's ed.* 1846, 247, 270. *Jackson, ex dem. Van Alen, v. Vischer, supra*, 106. S. C., C. C. 116.

 Knapp v. Mead.

 WHEATON *against* SLOSSON. [*111]

In an action of *assumpsit*, the *venue* will not be changed on the general affidavit.

TEN BROECK moved to change the *venue*, on an affidavit, that the cause of action arose out of the county.

Emott, contra, objected, that this being an action for money had and received, a general affidavit was not sufficient.

Per Curiam. It has already been decided, that in *assumpsit*, where the count is general, the court will never change the *venue* on a general affidavit. To entitle the defendant to prevail in his motion, the affidavit must be special, that is, it must state, that the defendant has reason to believe, that special matter is intended to be given in evidence, enumerate the particulars, and declare that it arose in the county to which he would remove the cause, and not elsewhere.

Motion denied.(a)

 KNAPP *against* MEAD.(b)

A trial by record is to be brought on by motion, pursuant to a notice of four days, as in other special motions.

THIS being the day assigned for the trial by the record, on which this suit was brought,

Beers now moved to bring it on, but it was objected in behalf of the defendant, that there ought to have been a regular notice of trial, of eight days, as in other cases, which had not been given.

*The court took time to consider how the practice [*112] ought to be settled.

Per Curiam. The trial by record must, hereafter, always

(a) See note (a) to *Bentley v. Weaver*, *supra*, vol. 1, p. 241; also *Grah. Prac* 2d ed. 561 *et seq.*; 2 *Rev. Stat.* 499, § 2.

(b) S. C., C. C. 122.

 Swift v. Livingston.

come on by motion, pursuant to a notice of four days, instead of the old practice of assigning a time, which the present rules render useless.(c)

 SWIFT against LIVINGSTON.(a)

The tenant in a writ of right, may be called on the first day of the term, and his default entered for his non-appearance, and if he does not appear, on the *quarto die post*, and excuse his default, he will be nonsuited.

EMOTT, for the tenant in a writ of right, moved on the first day of the term, that the demandant be called, and that his default be entered for his non-appearance ;

And this being the *quarto die post*, he again moved, that the demandant be called to appear, and excuse his default, or that he be nonsuited. (Vin. Abr. 436, 9, 10, and 439, 19.)

Scott, contra.

Per Curiam. In the case of *Clobery v. The Bishop of Exon*, (Carthew, 173,) it was decided, that the tenant, in a writ of right, is only demandable on the *quarto die post* ; but that the demandant is liable to be called on the *primo die placiti*, and in case of non-appearance his default may be entered, which, if he does not appear and excuse, on the *quarto die post*, he is liable to a nonsuit. (Co. Litt. 139, b.) At common law, on every continuance or day given, at or before judgment, the plaintiff or demandant might have been nonsuited ; and before the stat. of Henry IV. after verdict, if the court gave a day to be advised, at that day [*113] *plaintiff was demandable, and, therefore, might have been nonsuited, if he did not then appear ; but that is remedied by our statute. After an award to answer, however, or a demurrer in law joined, the plaintiff for not ap-

(c) Trial by record was a non-enumerated motion ; *McKenzie v. Wilson*, 2 Caines, 365 ; and brought on by motion pursuant to a notice of four days ; principal case ; *Manhattan Co. v. Herbert*, 1 Caines, 6 ; but it is abolished by the Revised Statutes of New York ; vol. 2, p. 331, § 4, 2d ed.

(a) S. C., C. C. 122.

-M'Kinstry v. Edwards.

pearing shall still be nonsuit, for he is not helped by the statute.

Judgment of nonsuit.(b)

MPKINSTRY against EDWARDS.(c)

A default for not pleading, will be set aside on an affidavit of merits, if the defendant also shows a satisfactory excuse for not pleading.

ON a motion to set aside the default, and that the defendant have leave to plead, on the sole ground that he had merits, the plaintiff not having lost a trial.

Per Curiam. When a party swears to merits, the court will strongly incline to let him in, but he must be able to suggest some excuse for not having pleaded, such, perhaps, as accident or inadvertence. Here the defendant does not attempt to give any reason at all, and, therefore, he must take nothing by his motion.

Rule refused.(d)

(b) See n. (a) to *Haines v. Budd, supra*, vol. 1, p. 335.

(c) S. C., C. C. 124.

(d) "Where the default has been regularly entered, also, the court will in some cases relieve the defendant, and let him in to plead, upon terms. It was formerly the practice to set aside a regular default, on an affidavit of merits, only where the defendant could show some excuse for his default; (1 Dunt. 379, and cases there cited;) although they do not appear to have been strict in examining the sufficiency of the excuse; and in some instances they have relieved against the attorney's ignorance, or misapprehension of the practice. 3 Johns. Cas. 92; 6 Johns. 129. The rule also, in latter cases, appears to have been fully settled, that where no trial had been lost, the court would set aside a default, on an affidavit of merits, 6 Johns. 131; 14 Johns. 342, (which cannot be contradicted, 2 Wend. 286,) on payment of costs of the default, and of resisting the motion, provided the party applied with due diligence, and upon such other terms, as under the circumstances of the case, might be proper. 3 Caines, 95; 6 Johns. 130. The court, however, in a recent case, have returned to the old rule, and the practice now appears to be settled, that a default for not pleading will not be opened, unless excused. 6 Wend. 517; see 1 Hall, 54. As it is wholly discretionary, however, in the court to do this or not, they will not set aside a regular judgment,

 Jackson v. Larroway.

[*114] *JACKSON, *ex dem.* LEWIS and others, *against*
 LARROWAY.(a)

Where the trial of a cause is put off, on payment of costs, the plaintiff may demand the costs immediately, and if not paid, may proceed in the cause, or he may have the costs regularly taxed on due notice, and if after service of the taxed bill, the costs are not paid, he may take out an attachment *instantly*.

Notice of taxing costs, must be served on the *attorney*, not on the counsel.

VAN VECHTEN moved to set aside the attachment in this cause, which had been granted for the costs of putting off the trial, and that there should be a retaxation.

He contended that attachments are ordinarily granted on rules to show cause, and are never made absolute, in the first instance, but in very flagrant cases; and that if the party answers, he shall be discharged from the attachment; and cited 1 Bac. Abr. 183, (B). 2 Hawk. Plea. Cr. 214. He further insisted, that there must be a demand made of the

in order to give the defendant an advantage of any nicety of pleading; 2 Str. 1242; or a special plea of questionable matter, designed to draw the plaintiff to demur; 2 Salk. 518; but this court have, in such a case, refused to impose as a condition, that the party should not plead the statute of limitations; 10 Wend. 595; though formerly, the practice was otherwise. 2 W. Bl. 35. And the Common Pleas in England, have refused to set aside a regular judgment, where it appeared that the defendant had refused to accede to equitable terms of compromise. 4 Taunt. 885. When the court set aside a regular judgment, it is usually upon the terms of the defendant's paying costs. 1 Salk. 402; see Barnes, 256; pleading *issuably instantly*, 1 Burr. 586; taking short notice of trial, Barnes, 242, (although this would not extend to a writ of inquiry; 6 Taunt. 458;) and giving judgment of the term, 2 Str. 823, when necessary; and in some cases also they will order the defendant to bring the money into court. Barnes, 243. And in a recent case in this court, it was laid down that on setting aside a default, for want of a plea, on the ground of merits, if it appear probable that the plaintiff may lose his demand, by reason of the defendant's being in doubtful circumstances, the court will order the judgment to stand as security, and grant a rule, that the defendant may plead and go to trial, on payment of costs. 6 Cowen, 390. After the default is opened, the defendant is bound to plead, without being served with a copy of the declaration. 2 Wend. 628." Grah. Prac. 2d ed. 788, 789.

(a) S. C., C. C. 123.

Jackson v. Larroway.

costs, after the bill has been regularly taxed, before the party can be considered as in contempt. (Barnes, 120. 1 Lilly's Abr. 162.) Besides, he insisted, that according to 1 Salk. 83, no attachment will lie at all for the costs of putting off a trial.

L. Elmendorf, contra, contended, that in England the attachment is always absolute in the first instance. He cited Tidd's Pr. 364. Runnington on Ejectment, 142. 1 Sellon, 415.

Per Curiam. Whenever a cause goes off, on motion of the defendant, upon payment of costs, the plaintiff has his election, either to wait the event of the suit, and have all his costs taxed together, or he may make them out, *instantly*, under the direction of the court, (subject, however, to be reviewed on a future taxation, if required,) and demand them immediately, and if not paid, he may proceed with the trial; or he may waive this privilege, and resort to an attachment, but if he does so, he must first have his costs regularly taxed, on a proper notice, as in other cases, and that notice must be served on the *attorney* in the suit, (b) and not on the *counsel*, as has irregularly been done, in "this in- [*115] stance. Had he been regular in this, he would have been entitled to his attachment instantly, without a previous notice.

The notice in this case having been served on counsel, and the taxation having been made on the same day notice was given, the taxation and all proceedings founded on it were irregular.

The case mentioned from Salkeld is anonymous, and standing alone, we think it not entitled to weight.

The attachment must be set aside with costs.

Rule granted.(c)

(b) See *People v. Hassenfratts*, 3 Cowen, 26; *Howland v. Ralph*, 3 Johns. 20; *St. John v. Hubbard*, 1 Wend. 194; *Burns v. Burns*, 7 Cowen, 470.

(c) "When the trial is thus put off, it is usually upon the terms of paying any costs the opposite party may have thereby been put to; and when the plaintiff sued as a pauper, and the defendant had the trial put off, upon undertaking to pay the costs of the day, the Court of Common Pleas granted an attachment against the defendant for the non-payment of these costs. 1 B. &

Jackson v. Hornbeck.

JACKSON, *ex dem.* Low, *against* HORNBECK.(a)

The two days allowed by the rule of January term, 1799, for making up a case cannot be enlarged by the order of a judge.

BOWMAN moved to vacate a certificate of a judge, giving further time to make up a case.

L. Elmendorf, contra.

Per Curiam. The two days allowed by the 6th rule of January term, 1799, for making a case, cannot be enlarged by a judge, in favor of a party making the case; but the time, which may be enlarged, under that rule, is that allowed for proposing amendments, and for giving notice of an appearance before the judge, and no other.

Rule granted.(b)

P. 39. And these costs should be paid *instanter*, that is, within twenty-four hours; Rule 60; and for this purpose, it is the duty of the defendant to seek the plaintiff, and tender the costs after taxation, 2 Wend. 293, without waiting for a formal demand; 19 Johns. 270; *et vide* 1 Johns. Cas. 396; although, perhaps, the rule should express that the costs are to be paid *instanter*, it being provided by rule 60, that in all cases where a motion shall be granted on payment of costs, or on the performance of any condition, or where the order shall require such payment or performance, the party, whose duty it shall be to comply therewith, shall have twenty days for that purpose, unless otherwise directed in the order. This rule is probably intended to apply to motions in bank; but to avoid any question, the judge at *nisi prius* would, upon suggestion, direct an express provision in the rule, as to the time of payment." Grah. Prac. 2d ed. 287, 288.

(a) S. C., C. C. 127.

(b) "The time for preparing a case, bill of exceptions, special verdict, or demurrer to evidence, and the time for preparing amendments thereto, may be enlarged by the judge before whom the cause was tried, or by one of the justices of this court, but not by any other officer; Rule 39; 9 Johns. 264; 2 Johns. Cas. 115; S. C. Colem. 127; but an order for time to make a case, cannot be enlarged after it has expired, but only while it is running; if it once expire, relief can be had by motion to the court only, for which purpose, a judge may grant an order to stay proceedings. 7 Cowen, 467. Where the case is made subject to the opinion of the court, it need not be prepared at the trial, but a minute of the questions to be presented, and the evidence on which they arise, may be made, and the case may be subsequently drawn up, amended, and settled within such times and under the same regulations, as are above made with respect to cases. Rule 38. The same practice ap-

*SCOTT *against* GIBBS.(a)

[*116]

An affidavit to change the venue made by the defendant's attorney, stating that the plaintiff *confessed* that the cause of action arose in another county, is sufficient.

A counter affidavit of the plaintiff, that he believed he could not have a fair trial &c. is not enough ; it ought to state the facts on which the belief is founded.

WOODWORTH, for the defendant, moved to change the venue in this cause, which was an action of slander, from the county of Albany to Washington ; he read an affidavit of the defendant's attorney, stating that the cause of action arose in Washington, and not elsewhere, &c. *as the plaintiff had informed him*, and he verily believed to be true.

On the part of the plaintiff, this was opposed by a counter affidavit, stating that "according to his persuasion, and belief, he could not have an impartial trial, in the county of Washington, by reason of certain local prejudices."

Per Curiam. The first question is, whether the affidavit on the part of the defendant, ought not to have been made by the defendant himself, according to the established practice ? As the attorney swears, however, that the *plaintiff confessed to him*, that the cause of action arose in Washington, and not elsewhere, &c., this may be deemed sufficient ; especially as the fact is not denied by the plaintiff. As to the counter affidavit, it cannot avail to retain the venue, inasmuch as the defendant only swears to "his persuasion and belief that he cannot have a fair trial, by reason of certain local prejudices," &c. He ought to have stated the reasons and ground of his belief, and have laid before the court the facts and circumstances on which it depends, that they

plies, also, in relation to feigned issues from chancery, as regards the preparing and settling of the case, where either party intends to apply to the court of chancery, for a new trial, on the ground of any erroneous decision, or misdirection of the judge, before whom the issue was tried, or that the verdict was against the weight of evidence. Chan. Rule 140." Grah. Prac. 2d ed. 331, 332.

(a) S. C., C. C. 127.

Scott v. Gibbs.

might judge of its probable truth and force. He merely states his own conclusions, without stating also the premises on which his belief is grounded. (3 Burr. 1380, 1335. 1 Selton's Prac. 169.)

Rule granted.(b)

(b) Circumstances that will probably prevent a fair and impartial trial in the county where the venue is laid, will constitute a good reason for changing it. 2 R. S. 409, § 2. *The People v. Webb*, 1 Hill, 179. *The People v. Vermilyea*, 7 Cowen, 108. Thus that the adverse party has considerable influence which he will probably exert, and many persons hold freeholds under him whom he may turn off at pleasure; *Smith v. Hortler*, 1 Car. Law Rep 518; that there is popular excitement which has twice resulted in ineffectual attempts to obtain verdicts in the county where the venue is laid; *Messenger v. Holmes*, 12 Wend. 203; see per Marcy, J. in *Bowman v. Ely*, 2 id. 250, 251; that the circuit judge of the district in which the county is situated where the venue is laid, was before his appointment counsel in the cause, *Van Rensselaer v. Douglas*, 2 id. 290; have been held sufficient to warrant a change of venue upon this ground. But a change of venue has been refused where it was moved on the ground that the corporation of the city of New York was a party, and that in consequence an impartial trial could not be had in that city in which place the venue was laid. *Corporation of New York v. Dawson*, *infra*, 335. So where it was moved merely on the fact that the sheriff of the county where the venue was laid was a party to the suit, and "that from his office a fair and impartial trial could not be had there." *Baker v. Sleight*, 2 Caines, 46. And where, in a turnpike cause, the affidavit stated no more than "that from the prejudices of the county against turnpike roads an impartial trial could not be had." *The President &c. of the New Windsor Turnpike Road v. Wilson*, 3 Caines, 127. And where in an action of slander the plaintiff, to retain the venue where he had laid it, swore, "that some of the slanderous words, for which he instituted this suit, were spoken of him, as he verily believes, and has been informed, in relation to his public capacity, as canvasser of an election of senators for the western district; that the defendant is classed among those whose political opinions are different from his own; and that, on account of the violent party spirit which prevails in Montgomery, he believes an impartial trial cannot be there had." In this case the court say: "We do not think the plaintiff entitled to retain the venue in Albany. The court will not presume that an impartial trial cannot be had, merely because the parties differ in politics, and a violent party spirit prevails in Montgomery. If the plaintiff had stated that the inhabitants of that county had generally prejudged the question; or were particularly interested in it; or that, for certain reasons, they entertained a prejudice against him; or, that the defendant was a person of uncommon influence, it might have altered the case. It does not follow, that because some of the words were spoken of him as canvasser of an election for the western district, that

 Sharp v. Dusenbury.

 *SHARP *against* DUSENBURY.(a) [•117]

If parties agree that the sheriff may admit any evidence, on a writ of inquiry before him, which could have been given on a trial, the court will not set aside the inquisition, because improper evidence had been received or proper evidence rejected by the sheriff.

Such an inquest is to be considered as in the nature of an arbitration.

P. W. YATES moved to set aside an interlocutory judgment, because the sheriff before whom the inquisition was taken, had admitted improper, and rejected proper evidence.

Emott, contra, read an affidavit that it had been agreed between the parties, than any evidence might be given be-

the inhabitants of Montgomery will be more partial than those of any other county, for in the event of such an election, the citizens of the whole state have nearly the same interest. If violence of party spirit (which in free governments will always rise to a certain degree) be a reason for changing a venue between suitors of various political sentiments, there will be no end to applications of this kind, and after all, where will a county be found entirely free of it? We hope that no difference of this kind will ever influence deliberations within a court of justice, or prevent the decision of any controversy on its real merits." *Zobieskie v. Bauder*, 1 Caines, 487. And in an action of libel, where the plaintiff opposed the motion by the production of an affidavit of several disinterested and highly respectable individuals, in which they stated that from their knowledge of the excitement which has prevailed and still does prevail on the subject of masonry, they believed that the plaintiff could not have a fair and impartial trial before a jury of Monroe county (to which the venue was sought to be removed) it was held that this was no cause for refusing to change the venue on the ordinary affidavit. *Bowman v. Ely*, *ut sup.*

In order to induce the court to interfere, upon the ground that an impartial trial cannot be had, the fact ought not to admit of doubt, but on the contrary, should be made out conclusively. See *Grah. Prac.* 2d ed. 564. "The court will not, on any speculative opinion formed by individuals, however respectable, interfere with the ordinary course and practice of the court in the administration of justice." "Should it unfortunately happen that the apprehension of the plaintiff is realized, he will not be remediless, as it will then be in sufficient time to interpose the strong arm of the law to cause the course of justice to flow unpolluted by passion or prejudice." Per Marcy, J. in *Bowman v. Ely*, *ut sup.* See *Grah. Prac.* 2d ed. 564, 565. By whom moved for, *id.* 565. When moved for, *id.* 566. Costs of motion, &c. *id.* See also n. (a) *supra*, vol. 1, p. 241, to *Bentley v. Weaver*. Also 4 Hill, 62, 70, n. (a).

(a) S. C., C. C. 134.

Paddock v. Beebe.

fore the sheriff, which could be given on a trial, or could have been pleaded.

Per Curiam. The parties, by their agreement made the sheriff as a judge at a circuit; and when parties agree to submit a controversy to the decision of the sheriff, the inquest is to be considered, as in the nature of an arbitration, and in such case, the court will never set aside the inquisition merely because the sheriff admits improper, or rejects proper evidence.

Motion denied.

PADDOCK *against* BEEBEE.(a)

An affidavit of service on a clerk of the attorney, must state that the clerk was, at the time, in the office of the attorney.

A QUESTION AROSE as to the regularity of a service of a notice, which appeared from the affidavit to have been made on the clerk of the attorney; the court decided, that as it did not also appear, that the notice was served on the clerk, *while he was in the office*, it was therefore insufficient.(b)

[*118] *THE PEOPLE, *ex relat.* ALLAIRE, *against* THE JUDGES of WEST CHESTER.(c)

If a court of common pleas, without sufficient ground, refuse to seal a bill of exceptions, it is a contempt, and this court will award a *mandamus*, to compel them to sign it.

But if the bill of exceptions tendered be untrue it is a sufficient cause to refuse a *mandamus*.

On an affidavit that a bill of exceptions had been regularly tendered to the judges of the court of common pleas

(a) S. C., C. C. 135.

(b) Grah. Prac. 2d ed. 711, *et seq.*

(c) S. C., C. C. 135.

 Pepoon v. Jenkins.

of the county of West Chester, who had refused to seal the same,

Troup now moved for a *mandamus* to compel them to affix their seal to the bill of exceptions, or show cause.

Munro read a counter affidavit, stating that the bill of exceptions, varied materially from the truth of the case.

Per Curiam. If a court of common pleas refuses, without sufficient grounds, to annex their seal to a bill of exceptions, it is a contempt for which this court will award compulsory process. (2 Inst. 427.) But it appears here, from the affidavit on the part of the defendants, that the bill of exceptions which was tendered, was untrue, and as the party making the application, has not denied the correctness of the statement, he must be considered as having consented to it. This, undoubtedly, was sufficient cause for refusal.

Motion denied, with costs to the judges for opposing it.(b)

 *PEPOON *against* JENKINS.

[*119]

In an action brought on a judgment of the circuit court of the United States, for the district of Massachusetts, the production of the record, under the seal of the court, was held sufficient.

THIS was an action of debt, brought upon a judgment rendered in the circuit court of the United States, for the district of Massachusetts. On the plea of *nul tiel record*, the plaintiff offered in evidence, a record under the seal of the court, but certified by the clerk, as a copy.

E. Williams, for the defendant, objected that there ought either to be an exemplification of the record; or that the action, being brought in a court of this state, upon a record of a judgment rendered in a circuit court of Massachusetts, the record ought, agreeably to the act of Congress, to have the

(b) See note to *Fisk v. Weatherwax*, *infra*, p. 215; *Silas v. Ransom*, 6 Johns. 279; *The People v. The Judges of Washington*, 1 Caines, 511.

Pepoon v. Jenkins.

attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the attestation is in due form.

Per Curiam. This being a record of a court of the United States, and not of a state court, and so not within the act of Congress, prescribing the mode in which the records and judicial proceedings of the courts of any state shall be authenticated, it remains with the court to decide upon the sufficiency of the evidence. The mode of certifying the record in the present case, being the ordinary mode used in Massachusetts, instead of the technical exemplification, we are of opinion, as it is also under the seal of the court, that it is sufficient.^(a)

(a) *Barney v. Patterson's lessee*, 6 Har. & Johns. 182, 202, 203. *St. Albans v. Bush*, 4 Verm. R. 58. *Roche's heirs v. Bowers*, 9 Louisiana, (Curry's) 528. *Reed v. Ross*, 1 Baldwin, 36. "See also a similar case decided in the same way and upon the same ground, where the copy offered and received, according to the report, was an office copy. *Jenkins v. Kinsley*, Col. Cas. 136. Quere, however; for the circuit court of the United States in relation to the supreme court of New York, has been regarded as the court of another government; *Baldwin v. Hale*, 17 Johns. 272, 273; *Griswold v. Sedgwick*, 1 Wend. 131; and clearly, therefore, mere office copies of their judgments, &c., are not competent evidence. But examined copies are receivable; *Baldwin v. Hale*, *supra*; indeed, they are admissible, in cases of judgments, &c. strictly foreign in their character. Where the copy of a record of the district court of the United States sitting at Baltimore, was offered in the circuit court of the United States at Philadelphia, authenticated by the clerk, under the seal of the court, the same was held sufficiently proved; and the court seem to have taken judicial notice that the seal was the proper seal of the district court. *United States v. Wood*, 2 Wheel. Cr. Cas. 325, 326, 328. The copy in this case was on three distinct sheets of paper, not attached or connected together; and the court in respect to an objection on this ground, say, 'it is by no means fatal to the evidence, although it is certainly improper to certify records in the way that this is, in sheets unconnected by some fastening. But if the court, upon inspection, is satisfied (as we are in this case) with the verity of the record, that is sufficient.' *Id.* 326, 328. See further as to proving a record of the circuit court of the United States, *Leveering v. Dayton*, 4 Wash. C. C. Rep. 698." Cowen & Hill's Notes to 1 Phill. Ev. 1126. See also *id.* 896.

*JUHEL *against* RHINELANDER. [*120]

Articles contraband of war, are lawful goods, within the meaning of those words in a policy of insurance. Goods not prohibited by the laws of the country to which the vessel belongs, are lawful goods, and the insured are not bound to disclose to the insurers, that the goods are contraband of war. *Affirmed* in the court of errors, *infra*, 487, (a).

THIS was an action on a policy of insurance, dated the 24th November, 1796, on the brig Jenny, at and from New York to Cayenne, and at and from thence back to New York, with liberty to touch at Jacquemel. The policy was in the usual form without any warranty. The cause was tried at the circuit in New York, in November, 1799, when the jury found a special verdict.

The vessel sailed on the voyage insured, and on the 24th January, 1797, on the homeward voyage, was captured by a British cruiser, and carried into St. Christophers, where she was libelled with her cargo. On the 15th April, 1798, the vessel, and all her cargo, except two casks of nails, were acquitted, and on the 29th April, restored to the captain. The two casks of nails, under the name of scupper nails, were condemned as good and lawful prize, as being articles contraband of war, or otherwise subject and liable to confiscation. No disclosure was made to the defendants, that any contraband articles were on board. On the 4th May, a survey of the vessel was made, at the request of the captain, under the authority of the court, and the brig, on the report of the surveyors, was condemned as unfit for sea, and was sold.

The vessel and cargo were abandoned to the insurers, on the 5th May, 1798.

Harrison, for the plaintiff.

Hamilton, for the defendant, declined arguing the cause. He said that he considered the case of *Seton, Maitland & Co. v. Low*, (1 Johns. Cas. 1,) as decisive, unless the court

(a) *Seton & Co. v. Low*, 1 Johns. Cas. 1. *Skidmore & Skidmore v. Deeds*, *supra*, 77.

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should think proper to alter their opinion ; that the object of the special verdict in this cause, was merely to have [121] the judgment *of the court, in order to bring the question before the court for the correction of errors.

The Court (Benson, J. dissenting) said, that they considered the decision, in the case of *Seton, Maitland & Co. v. Low*, as conclusive, and that the plaintiff was entitled to judgment accordingly.

Judgment for the plaintiff.(b)

WARDELL *against* EDEN.

Where the plaintiff after he had assigned a judgment to a third person, entered up satisfaction on the record, the court on motion, ordered the entry of satisfaction to be vacated.

Courts of law will take notice of and protect the rights of assignees.(c)

Where an attorney is employed, notice must be served on him, not on the party.(d)

HAMILTON, moved to vacate the entry of satisfaction on the record in this cause.

It appeared, that a bond had been executed, on the 15th June, 1800, by Eden to Wardell, conditioned for the payment of 50,000 dollars, and a judgment was entered upon the bond, on the 8th July last, by virtue of a warrant of attorney for that purpose, with a stay of execution for six months. On the 17th of July last, the judgment was assigned, for a valuable consideration, to Nathaniel Olcott, and by him, on the 1st of August, to Solomon Rowe, and by him, on the 7th of October, to the bank of New York. On the 7th of October, Olcott became bankrupt, and on the next

(b) Affirmed in the court of errors, in 1802, *infra*, 487.

(c) See n. (a) to *Andrews v. Beecher*, *supra*, vol. 1, p. 411 ; also *Timen v. Leland*, 6 Hill, 237 ; *Wheeler v. Wheeler*, 9 Cowen, 34 ; *Jackson v. Blodget*, 5 id. 202 ; *Briggs v. Dorr*, 19 Johns. 95 ; *Dawson v. Coles*, 16 id. 51 ; *Meghan v. Mills*, 9 id. 64 ; *Anderson v. Van Allen*, 12 id. 343 ; *Van Vechten v. Graves*, 4 id. 403 ; *Littlefield v. Story*, 3 id. 425 ; *Johnson v. Bloodgood*, *supra*, vol. 1, p. 51.

(d) See *Grah. Prac.* 2d ed. 711.

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day, Rowe died insolvent. The bank, on the 9th October, gave notice to Eden of the assignment to them, and forbade his paying any part of the bond to Wardell, and also gave a notice to Wardell, forbidding him to receive any thing from Eden. On the 6th day of October, Eden paid Wardell a small sum of money, and on the 10th October, Wardell entered upon the record, a satisfaction of the judgment. The bond was originally given, both for money due, *and to secure such further sums as [*122] Wardell should continue to advance.

The present motion was made in behalf of the bank of New York.

The notice of the motion had been served on the attorney of the defendant, by leaving it at his office, and on the defendant himself, by delivering it to his brother. The attorney was only named in the warrant of attorney, to confess judgment on the bond.

B. Livingston raised a preliminary question, whether the service of the notice of the present motion had been regularly made, as it had only been given to Eden's brother, who happened to be at Eden's house, and it did not appear, that it had ever come to his personal knowledge; or 2dly, as it had been given to Eden's attorney, by leaving it with his (the attorney's) brother, who happened to be alone in the office.

The Court. Both services cannot be good: wherever there is an attorney retained, the service must be on him; therefore the service on Eden himself, was irregular, but the service on the attorney's brother, being in his office, was good.

LANSING, Ch. J. and LEWIS, J. were of opinion, that the attorney in this case, being constituted only an attorney to confess judgment, his authority expired with the act, and therefore he could no longer be considered as attorney in the suit, but they both agreed that the service on Eden was well made.

Some further affidavits were read on both sides.

Hamilton and *Harison*, then contended, that in this tran-

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saction, a fraud had been practised between Eden [*123] and *Wardell, on the bank, by entering up the satisfaction after notice, which must have been done to defeat the lien which the judgment had given upon Eden's real estate. They insisted, 1st. That the entry of satisfaction was irregular, because it was done by the party himself, and not by his attorney. Though, by statute, a party might possibly "appear, prosecute, defend, &c. in person," yet that after he had once made an election to appear by attorney, he could not appear in the suit in proper person. Notwithstanding the suits are in the names of the obligees, yet courts of law will always take notice of the rights of assignees, and protect them from injury, so that substantial justice may be done between the parties. (1 Term Rep. 619; 4 Term Rep. 340.) The court may interpose in this summary way, and lay their hands at once on the judgment, without turning their applicants round to a court of chancery. (Viner's Abr. Judgment, K. a. 636. sec. 4, 5, 6.) Or if there should arise any doubts about the facts alleged, the court may direct an issue. (1 Wils. 33; Sayer, 253; Barnes, 130.)

The *Attorney General* and *B. Livingston*, contra. This is a novel way of bringing up such a question, when really neither of the parties to the suit are in court.

1. It was perfectly regular for the party to enter up the satisfaction himself, and it is neither the province nor the duty of the attorney to do it. The very form of his warrant shows this; for being merely to prosecute and defend, the entering up satisfaction of the judgment could not be considered as being comprised within his powers. (1 Sell. Prac. 14; Sayer, 217; 2 H. Bl. 608; 1 Bac. Abr. Attorney, 299.)

By the practice of courts, warrants of attorney are in force for one year and a day, for the sole purpose of enabling the attorney to sue out execution.

The general warrant of attorney only extends to judgment and execution, and there ought to be a special warrant made out for the purpose of authorizing an attorney to enter satisfaction, which may be made to the attorney who has con-

ducted the suit, or to any other. (1 Sell. 546; 1 Crompt. 378; Impey, 408; T. Raym. 69.)

*The doctrine contended for on the other side, that [*124] all acts relating to a suit, after it is instituted, must be done by the attorney, cannot be true, as it is settled law, that a *retraxit* must be always entered by the party himself, and can never be done by attorney. (2 Sell. 338; 3 Salk. 245; 8 Mod. 58.)

2. Though courts of law will take notice of the rights of assignees, yet this can only be done *sub modo*; for *choses in action* are only assignable, by way of covenant. They might, perhaps, form a consideration for an *assumpsit*, but then the original instrument is gone, the demand becomes a personal one, and the action must be brought upon the promise; otherwise, the plaintiff must always resort to a court of equity. (2 Bl. Rep. 621; 4 Term Rep. 341, 640.) At any rate, this is not the proper method for the plaintiff to obtain a remedy, by vacating the judgment, on motion. The law, in such case, will oblige a party, paying money after notice, to pay it over again, and the demand, therefore, from the time of the notice, is a personal one. (Doug. 338; 6 Term Rep. 361.)

3. Courts of law never vacate a judgment for fraud, but only for irregularity, or in cases of legal disability, such as of an infant, *feme covert*, or any person under duress, where the instrument is avoidable. (1 Sellon, 377.) At common law, the remedy is by an action of deceit, and if it happens subsequent to judgment, by an *audita querela*. In cases of fraud, or other controverted facts, an issue is always to be directed. (Cowp. 727.)

If an entry should be made, vacating the judgment, on the ground of fraud, and, afterwards, a jury, whose exclusive province it is to judge of matters of fact, should find the fact differently, then the record would be at variance with itself. But it would be improper in this court to direct an issue. The court of chancery is the proper forum, and there the bank may seek their remedy. The plaintiffs may, perhaps, proceed by *scire facias*, on the judgment, in the name of

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Wardell against Eden, and the pleadings would afford an issue of fraud or no fraud, to be tried by a *jury. [*125]

As to the notice of the assignment, so much relied on, the furthest the court could go in regard to notice to assignees, would be to put them on the same footing with indorsers of bills of exchange, in regard to which it is not only necessary to give notice, but to add that the indorser is looked to for payment.

Hamilton and *Harison*, in reply, said that this was the only way that the plaintiffs had to secure the property from being placed entirely beyond their reach ; and that although a *scire facias* should be brought, as suggested on the other side, yet that they could have no security for the satisfaction of their judgment, in the event of their recovering one. That as to the instance of a *retraxit* which had been cited, it did not apply, for the attorney is to prosecute the suit for the end of obtaining satisfaction, but a *retraxit* is not a prosecution for such an end ; it is entering a bar to the suit without having received satisfaction. It is important that attorneys should make the entry of satisfaction, as it would guard the court against fraud, for the court can always know its own officers, but cannot be supposed to know the party.

Courts of law, as to their power to vacate judgments, are not confined to cases of irregularity only. In the case of the *Quare impedit*, in *Viner*, a judgment was vacated on the ground of fraud, not, it is true, by motion ; but that depended on the extension of this form of practice, of late years. As to sending the plaintiffs to a court of chancery, it was objectionable : 1. Because, although a court of chancery will not interfere where the party has a remedy at law, yet the converse of the proposition is not true. 2. Because it would turn a legal lien, which the plaintiffs have, into a mere equitable lien. 3. Because, if there is a remedy at law, chancery will refuse to relieve.

Per Curiam. On the facts appearing in this case, we think there is probable cause to conclude, that there was a collusion between Wardell and Eden, to defraud the bank.

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*A court of law will always take notice and pro- [*126]
tect the interest of an assignee ; but not so as to con-
clude or injure any party, but so as to save the rights of all.
We therefore direct the following rule to be entered in this
cause :

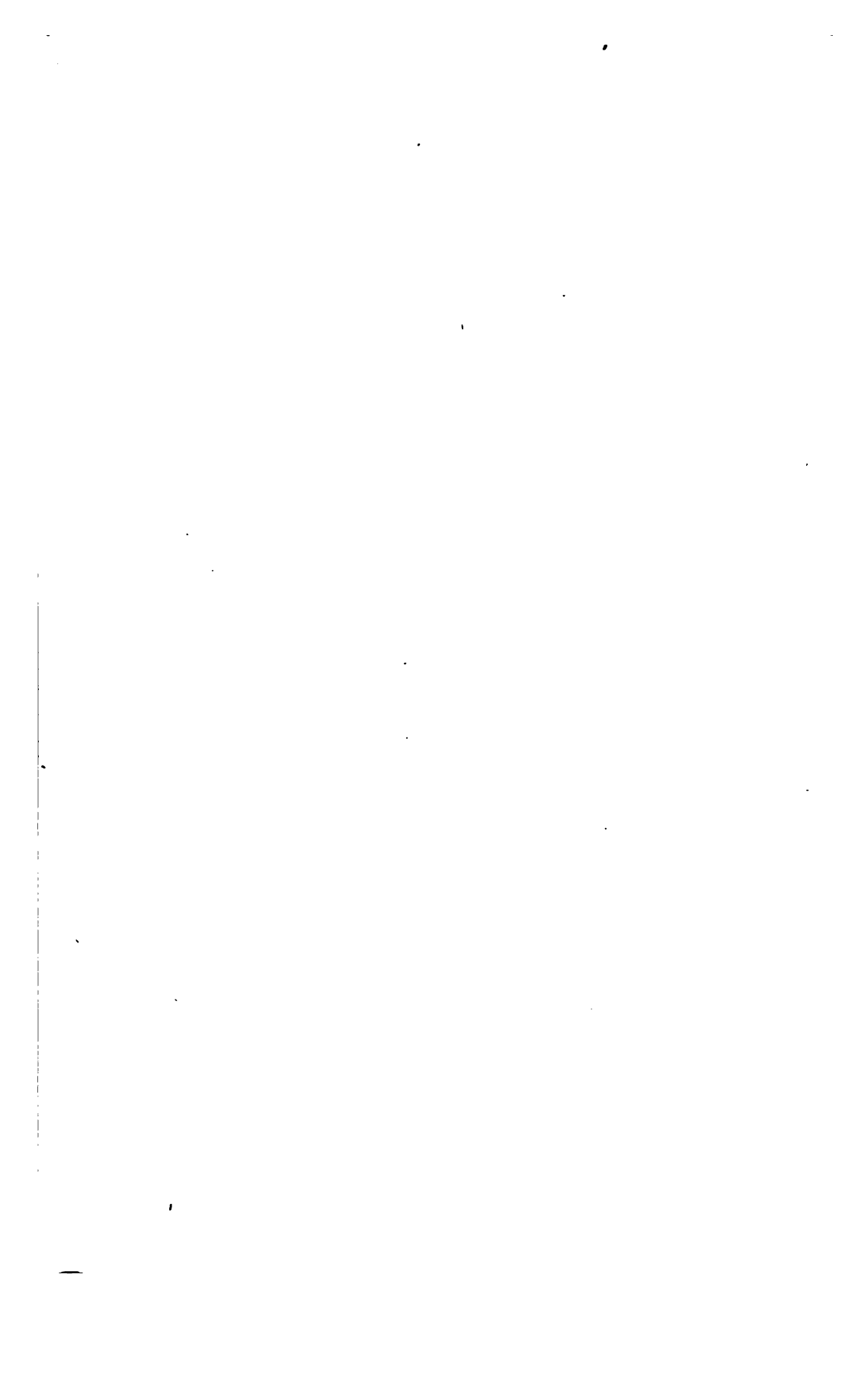
“ On reading and filing the affidavit of Martin S. Wilkins,
and the papers thereunto annexed, on the part of the presi-
dent, directors and company of the bank of New York, claim-
ing to be assignees of the judgment in this cause, and the
affidavits of the said Joseph Eden, and the papers thereunto
annexed, on the part of the said Joseph Eden ;

“ *Ordered*, That a *vacatur* of the entry of satisfaction of
the said judgment be entered on the record, and a minute
thereof made in the book of dockets of judgments : *Provided*,
that the said president, directors and company, shall not
cause a *scire facias*, or any writ of execution to be sued, or
a suit in debt to be brought on the said judgment, until they
shall have farther applied to the court ; and it is to be un-
derstood also, that the said Joseph Eden may at any time
apply to the court, that the entry of the satisfaction may be
deemed unvacated, or that satisfaction be entered anew on
the said record, and the court will, on such future applica-
tions of the parties respectively, take such order as shall be
just : and it is further *ordered*, that the clerk cause a copy
of this rule to be annexed to the said record.”

LANSING, Ch. J. and LEWIS, J. *dissented*.

Rule granted, as above.(a)

(a) This rule was made absolute in April term, 1800.



CASES
ADJUDGED IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW YORK,
IN JANUARY TERM, IN THE YEAR 1801.

[Mr. Justice Lewis was absent, during the whole of this term.]

**VANDENHEUVEL *against* THE UNITED INSURANCE
COMPANY.**

In an action on a policy of insurance, containing a warranty of American property, it was held, that the sentence of a foreign Court of Admiralty, condemning the property as lawful prize, was conclusive evidence as to the character of the property, and of the breach of the warranty. (a)

It is a general rule that whenever a matter comes to be tried in a collateral way, the final sentence of any court having competent authority, is conclusive evidence of the matter so determined in all other courts having concurrent jurisdiction. Per *Kent*, J.

The effect of judgments of courts having *peculiar* jurisdiction of the subject matter considered. Per *Kent*, J.

THIS was an action on a policy of insurance, on the freight of the "American ship, called the *Astrea*, from New York to Corunna." The cause was tried at the last March circuit, in the city of New York, when a verdict was taken for the plaintiff, for 4365 dollars and 6 cents, subject to the opinion of the court, on the following case, which it was agreed either party might turn into a special verdict.

(a) Reversed in error, *infra*, 451. See *Ludlow v. Dale*, 1 J. C. 16; *Gois v. Low*, id. 341.

Vandenhoevel v. The United Insurance Company.

The defendants, for a premium of 15 per cent. on the 9th March, 1798, insured 4000 dollars, valued at that sum on the freight.

[*128] *The insurance was effected, in consequence of the following written application from the plaintiff to the defendants, dated 14th November, 1798.

"Gentlemen,

"What will be the premium on the ship, freight, and cargo, of the *Astrea*, captain Price, consisting in mahogany, tobacco, slaves, dye-woods, and sugar, at and from New York to Corunna, to sail in eight days; property of the undersigned.

"I. C. Vandenhoevel."

The *Astrea* was captured, during her voyage, by a British frigate, and, with her cargo, was condemned as lawful prize, to the captors, by the court of vice-admiralty, at Gibraltar, "as belonging, at the time of her capture, to Spain, or to persons being subjects to the king of Spain, or inhabiting within the territories of the king of Spain, enemies to the king of Great Britain."

The freight insured was lost by the capture and condemnation, and duly abandoned to the defendants, with the usual proof of loss and interest.

Unless the court should think the plaintiff concluded, by the sentence of condemnation, it was to be received as a fact in the case, that the ship and cargo were really the plaintiff's property; and that the ship was registered, and had all the usual documents of an American vessel.

The plaintiff was born a subject of the United Netherlands, and continued so, until the 3d day of June, 1793, when he became a naturalized citizen of the United States. That he was a Dutchman, was a fact known to the defendants, at the time of subscribing the policy.

It was agreed, that if the court should be of opinion, that the plaintiff is entitled to recover for a total loss, judgment was to be rendered on the verdict, as it stood. But if the

opinion of the court should be, that there should be
 [*129] only a return of premium, judgment should be en-

Vandenheuvel v. United Insurance Company.

tered for the plaintiff for the sum of 700 dollars. But if nothing, in their opinion, ought to be recovered, judgment was to be given for the defendants.

The defendants also underwrote a separate policy on the cargo of the same vessel for the same voyage, on which a verdict was also taken for the sum of 15,000 dollars, subject to the opinion of the court in the other cause.

Hamilton and B. Livingston, for the plaintiff.

Harison and Troup, for the defendant.

RADCLIFF, J. This was an insurance on the freight of the *Astrea*, from New York to Corunna, in Spain. The policy was subscribed by the defendants on the 19th November, 1798, in consequence of a written representation from the plaintiff, stating the ship, freight and cargo to be his property.

The plaintiff was originally a subject of the United Netherlands and continued so until the 3d January, 1793, when he was naturalized as a citizen of the United States. He must of course, have emigrated to America, at least two years antecedent to that period, and before the United Netherlands were involved in the late European war, and he is stated to have been personally known to the defendants.

The vessel during the voyage was captured by a British frigate, as a prize, carried to Gibraltar, and with her cargo, there condemned by the court of vice-admiralty, on the ground of her "belonging, at the time of her capture, to Spain, or to persons being subjects of the king of Spain, or inhabiting the territories of the king of Spain, enemies of Great Britain." From the situation of the plaintiff, and the representation of the defendants, the insurance must be considered as made upon American or *neutral property*. The representation is, to this purpose, equivalent to a warranty of that fact, and liable to the same result.(a) In my view of the subject two questions arise.

(a) The breach of a warranty consists either in the falsehood of an *affirmative* or the non-performance of an *executory stipulation*, in either case the contract is void *ab initio*, the warranty being a condition precedent; and whether the thing warranted was material or not, whether the breach of it proceeded

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[*130] *1st. Whether, upon the *terms of the contract*, the plaintiff is entitled to recover?

from fraud, negligence, misinformation, or any other cause; the consequence is the same. The warranty makes the contract hypothetical; that is, it shall be binding if the warranty be complied with. With respect to the compliance with warranties, there is no latitude, no equity; the only question is, has the thing warranted taken place or not? If not, the insurer is not answerable for any loss even though it did not happen in consequence of the breach of the warranty. *Hibbert v. Pigou*, cited in *Marshall on Ins.* 375. *Woolmer v. Muilman*, 3 Burr. 1419. If the thing insured is represented in the policy as belonging to the subjects of a neutral state it is equivalent to a warranty; *Lothian v. Henderson*, 3 B. & P. 499; *Walton & Pagan v. Bethune*, MSS. commented on in 1 Tr. Con. Rep. 381; but if the interest of one joint owner of a cargo be insured, and if that interest be neutral it is no breach of the warranty of neutrality, if the other joint owner whose interest be not insured be a belligerent, for the assured are not understood to warrant that the whole cargo is neutral, but that the *interest insured* is neutral. *Livingston v. Maryland Ins. Co.* 6 Cranch, 274. Neutral property in the sense in which that expression must be understood in this warranty, is that which belongs to the subjects of a state in amity with the belligerent powers; *Marshall on Ins.* 890; and this is to be determined by the domicile of the owner. *Arnold v. United Ins. Co.* 1 J. C. 368. *Johnson v. Ludlow*, 2 id. 481. S. C. 1 O. C. E. 29. *Jenke v. Hallett*, 1 Caines, 60, 64. *Livingston v. Maryland Ins. Co.* 7 Cranch, 506, 542. *The Venus*, 8 id. 278. *The Frances*, id. 235. *The Mary and Susan*, 1 Wheat. 46. *Abbott v. United Ins. Co.* 16 Johns. 128. *The Antonia Johanna*, 1 Wheat. 159. *The Freundschaft*, 4 id. 105. *Tabbe v. Bendelack*, 4 Esp. N. P. 108. *Baring v. Claggett*, 3 B. & P. 207. *Wilson v. Marryatt*, 8 T. R. 31. *Albrectht v. Sussmann*, 2 Ves. & B. 323. *McConnell v. Hector*, 3 B. & P. 113. *Wissman v. So. Ca. Ins. Co.* 2 Rice's Dig. 21. Under a warranty in a policy of insurance that the ship and cargo are neutral property, it is sufficient that they are so when the risk commences; *Eden v. Parkenson*, 2 Douglass, 732; *Tyson v. Gurney*, 3 T. R. 477; but any forfeiture of the obligations of neutrality by the act or omission of the assured or his agents after the commencement of the voyage insured is a breach of such warranty. *Garrels v. Kensington*, 8 T. R. 230. *Fitzsimmons v. The Newport Ins. Co.* 4 Cranch, 185. *Cleveland v. Union Ins. Co.* 8 Mass. 308.

A warranty of national character imports that the ship shall be properly documented; thus, a warranty that a ship is "*American*," imports that she is entitled to all the privileges of an American flag; *Rich v. Parker*, 7 T. R. 705; *Kidd v. Walker*, 1 Dow. 331; *Bell v. Carstairs*, 14 East, 394; *Evereth v. Lunns*, 1 Stark. 508; and that it shall be provided and accompanied during the voyage with all the documents required by the general laws of nations or by particular treaties, so that she may not be liable to any impediment or inconvenience in the course of the voyage; *Rich v. Parker*, 7 T. R. 709, 710; *Blagge v. N. Y. Ins. Co.* 1 Caines, 549; *Calhoun v. Ins. Co. of Penn.* 1 Binn. 293; *Griffith v. Ins. Co. of North America*, 5 id. 464; *Coolidge v.*

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2d. Whether, in respect to the *fact of neutrality*, he is *concluded* by the foreign sentence?

If upon the contract he would be entitled to recover, and is not concluded by the sentence, it is conceded or offered to be proved, that the property was in reality neutral, or such as was so represented by the defendants.

The second question has already been twice determined in this court; first, in the case of *Ludlow v. Dale*, (1 Johns. Cas. 16,) in which I gave no opinion, it having been argued

N. Y. Fireman Ins. Co. 14 Johns. 308; but there is no implied warranty on the part of the owner of goods that they shall be in all respects properly documented. *Carruthers v. Gray*, 3 Camp. 142; 15 East, 35.

In *Lothian v. Henderson*, 3 B. & P. 524, Mr. Justice Lawrence said: "A warrant of neutrality must, I conceive, now be understood as containing in itself, amongst other things, a stipulation, that the contract of assurance shall be void if the subject matter warranted neutral be condemned as enemies' property; and if a warrant of neutrality contains this stipulation, the sentence of a court of competent jurisdiction, condemning a ship on account of its want of neutrality is the proper evidence according to every principle and rule of our laws to determine that fact."

Mr. Duer in considering Mr. Marshall's definition of a representation, (1 Marshall on Ins. 450,) observes: "There are cases, in which a representation and a warranty, embracing the same facts, are the same in their legal construction and effect. Such is the result where from the nature of the subject to which the representation relates, any change in the facts that it affirms or implies, must be material. *Fillis v. Brutton*, 1 Park, 8 ed. p. 414. 1 Phillips, 206. *Vandenheuvel v. United Ins. Co.* 2 Johns. Cas. 129. *Macdowall v. Fraser*, Doug. 260. *Bowden v. Vaughan*, 10 East, 450. *Steels v. Lacy*, 3 Taunt. 285. *Feise v. Parkinson*, 4 Taunt. 639. *Edwards v. Footner*, 1 Camp. 530. *Nonnen v. Kettlewell*, 16 East, 176. *Von Tungeln v. Dubois*, 2 Camp. 151. *Driscoll v. Pasmore*, 1 B. & P. 200. *Driscoll v. Bewil*, id. 313. *Alston v. Mech. Ins. Co.* 4 Hill, 344. *Denniston v. Lillie*, 3 Bligh, 1st series, 202. *Murray v. Alsop*, 3 Johns. Cas. 49. *Kemble v. Bowne*, 1 Caines, 75. *Suckley v. Delafield*, 2 Caines, 252. *Callaghan v. Atlantic Ins. Co.* 1 Edw. Ch. R. 64. *Alsop v. Coit*, 12 Mass. 401. *Hazard v. New Eng. Ins. Co.* 1 Sumn. 211. 8 Peters, 557. *Carpenter v. American Ins. Co.* 1 Story, 57. 3 Benecke, 314. Thus it has been justly decided that a representation of neutrality is equivalent to a warranty. It embraces the same facts, imposes the same duties, is violated by the same acts or circumstances. A similar identity seems to subsist between a representation and a warranty, that the vessel, to which the insurance relates, will depart with convoy; and certainly exists in other cases that will hereafter be mentioned." Duer on Insurance, vol. 2, p. 647.

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before I took my seat ; and secondly, in the case of *Goir v. Low*. (1 Johns. Cas. 341.) In the last, although the subject, in some respects, presented itself to my mind in a different light, I was content to acquiesce in the opinion which had been previously delivered, considering the rule to have been definitively settled as far as depended on this court. The magnitude of the question has induced us to review it, in this and other causes, but notwithstanding the able and zealous discussion it has received, I can perceive no new lights to lead me to change my opinion.

It may be premised, that in the course of the argument much was said of the policy of the English courts in deciding this question in favor of the insurer, and the policy of our adopting a different rule. On a careful examination of the English decisions, I cannot discover any ground for this suggestion. They appear to rest on principles unconnected with any motive of policy, and are indiscriminately applied to their domestic as well as to foreign tribunals. If the consideration were proper in determining a rule for ourselves, I am unable to perceive its force or application.

In every instance of a foreign condemnation, a loss must necessarily happen. If the property be really American, and insured here, the burthen must fall on some of our citizens. It is then a question between them solely, and it can never be politic or just to seek to shift the loss from [*131] one description of citizens to another. If the property be not American, and insured in this country, an interested policy, if such could be justified, would dictate an opposite rule of decision, and lead to protect the American insurer against the foreign owner, and thus determine the question against the insured.

Again, if the property be American, and insured abroad, the remedy is placed beyond the reach of our laws, and it would be a vain presumption in the courts of this or any other country to attempt to prescribe a rule for foreign tribunals. But I dismiss this topic as unconnected with the merits of the question. Opinions founded on policy are necessarily various and fluctuating, and ought never to actuate

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a court of justice. The question, in every instance, must depend on its intrinsic merits arising from the nature of the contract and the general law of insurance, unless restrained by positive regulations.

In this view of the subject, the judicial determinations of courts in different countries, as well as the opinions of individuals, may differ; but the difference, I apprehend, can never, as has been imagined, become a matter of *national* concern. The regular administration of justice, when conducted with good faith, can never implicate the government with respect to foreign nations; and whatever rule may be established on this occasion, it cannot be considered as affecting the rights of our own citizens, as existing between them solely. If foreigners should at all be interested, it must happen in consequence of their voluntary act to seek insurance here, and they cannot complain of the conduct of our courts, if they receive the same measure of justice which is administered to others. I, therefore, equally lay out of view every argument derived from this source.

It is true there may be cases to interest the *government* in behalf of its citizens. When losses are sustained by the unjust sentences of foreign tribunals, there is no doubt but the party injured is entitled to apply to *his government* for redress; and that government, in case of *palpable injustice*, *has a right to demand and enforce repara- [*132] tion from the sovereign of the aggressor; it is even bound to do so, or, in its discretion, to grant reprisals, or an indemnity to the injured party. It then, and not till then, becomes a question of *national* concern. As such, the delicacy and importance attached to it, as to all national questions, would require the government to proceed with caution, and in doubtful cases rather to presume that justice has been done, than to impeach the integrity of foreign courts. Thus it is held that it ought not to interfere but in cases of violent injuries, countenanced and supported by the *sovereign* of the aggressor, and where justice is absolutely denied, *in re minime dubia*, by all the tribunals, and in the last resort. (*Gro. de Jure, &c. lib. 3, c. 2, s. 4, 5. 1 Coll. Jur, 102, 103.*)

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Vat. 257, 258.) This is the language of the most approved writers on public law, and is professed to be the practice of all civilized nations; and one (Vattel in the report on the Prussian memorial) of those writers, perhaps the most eminent and correct, exemplifies the maxim by referring to the principles maintained by the British government on a similar occasion. Hence it will be admitted, as a general rule, that every government is bound to respect the judicial decisions of foreign courts, and in the first instance to consider them as just, and of course generally conclusive. But these reasons for the rule are strictly applicable to the government alone when acting in behalf of its citizens. They cannot apply to the conduct of our courts in the ordinary administration of justice. We actually see the courts of France and England differ on the very question before us, and it has never been deemed a subject of *national* complaint by either. I, therefore, think, that it is not on the ground of *national* interference or courtesy, that such sentences in our courts are held to be conclusive; their exclusive quality depends on other principles.

1st. As between the insurer and insured, in case of a representation or warranty of neutral property, I think a condemnation in a foreign court of admiralty, when [*133] founded on the want of neutrality, operates definitively against the insured according to the terms and effect of the contract itself. During the existence of a maritime war, the state of commerce is necessarily more or less precarious. Neutrals are not exempt from this inconvenience, but neutrality, if respected, affords a great advantage. The neutral merchant, when he effects an insurance, may either retain the benefit of his neutrality, or, if diffident of its security, he may relinquish it, and specially insure his property against every possible loss. If he insure the property as neutral, he thereby signifies his intention to avail himself of his neutrality, and of course will pay a less premium; but in doing this it must follow that he takes upon himself the risk of that neutrality. He thus far *divides the risk*, and is to be considered his own insurer. He cannot by paying a

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less premium, enjoy the benefit of his neutrality, and at the same time the benefit of an insurance for the want of it.

It is obvious that every such representation or warranty is made, not with a view to an examination of the fact in our own courts, but in reference to the parties at war, and to the danger of capture and condemnation abroad. This is the direct object of the stipulation. It cannot be limited to the naked position that the property is in fact neutral. It may be so and yet possess none of the *indicia* or evidences of neutrality. These evidences, it is not denied, the insurer undertakes shall accompany it, and I think he equally undertakes that it shall enjoy the privileges of neutrality.

There appears to me no room for the distinction, that the insured engages to furnish the evidences merely, and at the same time not to maintain his neutrality when it may be called in question. If the proper evidences accompany the subject, it is not legally to be presumed that its neutrality cannot be maintained. Whatever abuses may occasionally be committed, we cannot act judicially, nor suppose the parties to have acted, on the presumption of injustice in foreign courts. The idea is inadmissible when applied to *the courts of a civilized nation, and if contemplated [*134] by the parties, ought at least to have been made the subject of a special provision in the contract. No doubt the underwriter may, by a special insurance, and the admission of a particular mode of proof, make himself liable, even for the unjust sentences of foreign courts; but he ought never to be held liable for such sentences, when proceeding on the very ground assumed by the insured himself. If neutrality can be called a risk, that risk is necessarily implied in the warranty; and the insurer, by the contract, is liable only to the remaining perils incident to the subject, allowing it to be neutral and to preserve that character. He engages for nothing more; and his premium must be deemed proportioned to those perils only. The effect of the representation or warranty, can, I think, on the face of the contract itself, admit of no other interpretation.

If this reasoning be correct, it follows, that the insured,

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having represented or warranted the subject to be neutral, can never, on the terms of the contract itself, recover against the insurer when it appears to have been condemned on a ground which denies its neutrality. It is immaterial, in this view of the subject, whether the condemnation be just or unjust; it is sufficient if it proceed on the want of neutrality.

2. The question in the English courts does not appear to have been examined in this light. They have been content to apply to the decisions of foreign courts of admiralty, a principle which has long been received and adopted in their domestic courts. They place them on the same footing, and consider the conclusiveness of their sentences, as necessarily resulting from the right of jurisdiction. In relation to their own courts the rule has undoubtedly been long established, both before and since the revolution, and it is not confined to courts of peculiar or exclusive authority, but applies to all. Not only the sentences or judgments of their ecclesiastical or other courts, where they possess exclusive cognizance, but the decisions of all the courts, in cases where they have concurrent jurisdiction, are deemed to be equally conclusive. Indeed, a contrary position would involve the absurdity of a power competent to decide, and at the same time ineffectual in its decision.

They have also, in a variety of cases, extended the rule to foreign courts of a different description. Thus, a bill to be relieved against actions of trespass for seized goods, (1 Ch. Cas. 237; 26 Car. II.) in an island of Denmark, was dismissed in chancery, because sentence was given in the court of Denmark on the seizure. So in case (12 Vin. 87, pl. 9; 2 Stra. 732, 733, S. C. best reported in Viner, 1726,) of a bill of exchange, the acceptance of which was vacated in a court of Leghorn, Lord Chancellor King held not only that the cause was to be determined by the *lex loci*, but the acceptance having been vacated by a competent jurisdiction, he thought the sentence conclusive, and that it bound the court of chancery in England. So Lord Hardwicke (1 Vez. 159, 1748,) decided, that if a marriage be declared valid, by the

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sentence of a court in France having proper jurisdiction, it is conclusive; and he held "that this was so, although in a foreign court, by the law of nations; for otherwise the rights of mankind would be very precarious and uncertain."

This doctrine applies, with peculiar force, to the sentences of the courts of admiralty, in relation to *prize*, and of every court proceeding on the general law of nations, as the basis of its authority. While the capture of enemy-property is admitted to be the right of a belligerent party, the institution of courts to try the validity of such captures must also be admitted. They exist in every country, and are established in our own. The objects of their institution are every where the same. They are invested with similar powers, pursue the same principles, and profess to be governed by the same system of laws, unconnected with the municipal regulations of any country. In this manner, they form a separate and independent branch of judicature, and although uncontrolled by a common superior, their *determina- [*136] tions, while they act with good faith, will generally be uniform and consistent. Considering them in this light, acting on the same principles, and governed by the same law, they come within the reasons of the rule which is applied to domestic tribunals of concurrent jurisdiction, and their decisions ought to possess equal force and authority.

But another principle of English and American jurisprudence, arising from the nature of the subject and the system of our courts, appears to me strongly to enforce this doctrine. The question of neutrality is involved in the general question of *prize*; it is a necessary incident, and the want of neutrality forms the principal ground of capture and condemnation. It is a settled maxim, that the courts of common law have no jurisdiction on the question of prize. It may collaterally arise, but *ex directo*, it is not within their cognizance; it belongs solely and exclusively to the courts of admiralty as courts of prize. This is established by a current of authorities, both ancient and modern, and the reasons on which they are founded are satisfactory and conclu-

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sive. If, then, the courts of admiralty have exclusive jurisdiction of the principal question of *prize*, which necessarily includes that of neutrality, and the courts of common law have no jurisdiction, it must follow, that the decisions of the former cannot be reviewed by the latter, and that whenever they occur, directly or collaterally, they must, like the judgment of other courts of peculiar jurisdiction, be considered as conclusive. If they were allowed to be reviewed, in what manner could we ascertain the merits of the former decision? Is the same evidence in our power, or in the power of the parties to obtain? The insured is a stranger to the transaction; the circumstances are unknown to him; the proofs, if not detained abroad, are in the hands of his adversary; they are generally concealed, or may with the greatest ease, be suppressed. How could he compel their production, or bring to light the merits of the case? To avoid these difficulties, are we to be governed by the written depositions taken in the admiralty abroad, or could they be received as evidence? It is well known that the rules of evidence in those courts are different from our own. By what rules are we to be governed? If exclusively by our own, the result in our courts may differ, and yet both judgments, as to the evidence on which they are founded, be equally just. Allowing even that the insured engages merely to furnish the evidence of this neutrality in foreign courts, that evidence must surely be understood to be of a nature usually received and demanded in those courts; for it is there only that it can be material. The engagement, relating to such evidence, of course, excludes the idea of a decision upon any other, and the interference of a court of common law, requiring a different mode of proof, and acting on different principles, would contravene one of the direct objects of the stipulation. In every shape, therefore, in which this subject can be viewed, insuperable difficulties present themselves, and evince the propriety of considering the foreign sentences as final.

In England, this question is at rest, by direct decisions on the point; but these decisions were principally made during

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the period of our revolution, or subsequent to it. They possess, therefore, no conclusive authority, but under similar circumstances, are to be regarded as we regard the decisions of the courts of all enlightened nations, high evidence of the law on the subject.

The cases in the English courts previous to the revolution are, however, not wholly silent on the question; so far as they relate to the general principle, that the sentence or judgment of any court of competent jurisdiction is to be received as conclusive, they have already been noticed.

There are some which immediately apply to the sentences of foreign courts of admiralty. The first in which the effect of such sentences appears to have been immediately considered, was the case of *Newland v. Horseman*, (1 Vern. 21. 2 Ch. Ca. 74. S. C. 1681,) in chancery. That was on "a question of *freight*, which had been tried in [*138] the court of admiralty at Barcelona, where an interlocutory judgment was given. Lord Chancellor Nottingham declared, that he would not slight their proceedings beyond sea, and if the damages had been there ascertained, or a peremptory sentence given, the same should have concluded all parties. The next case is that of *Hughes v. Cornelius*, (Carth. 32. 2 Show. 232. S. C. 1689,) in which, during a war between France and Holland, an English ship was taken by the French, under color of being Dutch, carried into France, and there condemned by the court of admiralty, as a Dutch prize. Afterwards, an Englishman bought this ship, and brought her into England, where the right owner instituted an action of trover for the ship against the purchaser. This matter being found specially, the defendant had judgment, "because the ship being condemned as a Dutch prize, this court will give credit to the sentence of the court of admiralty in France, and take it to be according to right, and will not examine their proceedings; for it would be very inconvenient if one kingdom should, by peculiar laws, correct the judgments and proceedings of the courts of another kingdom." In the *Theory of Evidence*, (an Irish ed. printed in 1761, p. 37,) a book considerably ancient, it is stated, that

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"in an action on a policy of insurance, with a warranty that the ship was Swedish, the sentence of the French admiralty condemning the ship as English property was held to be conclusive." (Bull. 244.) The same case is repeated, *in hæc verba*, by Mr. Buller, in his *Nisi Prius*, and has received the sanction of his name. He cannot be understood to refer to the case of *Hughes v. Cornelius*, as has been suggested, for that was not of a Swedish ship, nor on a policy of insurance. There is still another case, (Park, 178, 3d ed. not elsewhere reported,) of *Fernandez v. De Costa*, in 4 Geo. III. before Lord Mansfield, at *Nisi Prius*, in which there was a warranty that the ship was Portuguese, and being condemned as not being Portuguese, in the admiralty [*139] courts of France, the sentence of condemnation appears to have been considered as decisive in favor of the insurer. In that case, it seems, the law was received to be settled, as to the effect of the sentence, and the inquiry was confined to ascertain the ground on which it went.

In answer to the two former of those cases, a distinction has been taken between the direct and collateral effects of a foreign sentence; that it is conclusive only as to the transfer of property, for the benefit of all claiming under it, but not so as to collateral parties. I do not perceive the force of this distinction. If well founded, it appears to me to operate in favor of the insurer. The insured, the professed owner of the property, must certainly be a direct party to the sentence, if any one is a party; he, therefore, if any one, must be concluded. Besides, from the nature of the proceedings in courts of admiralty, which are *in rem*, all persons are considered as bound. The forms and manner of proceeding in those courts are founded on the idea of notice to all the world, and the operation of their sentences is deemed to be equally extensive. The distinction now attempted, I do not find to be supported by any authority, either before or since the revolution. Indeed, in England, the contrary rule prevails, both with respect to their domestic and foreign courts. It is general, that, "whenever a matter comes to be tried in a collateral way, the decree, sentence

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or judgment of any court, ecclesiastical or civil, having competent jurisdiction, is conclusive evidence of such matter." (Theory of Ev. 37. Bull. 244. Amb. 762, 763, and the cases there cited. 2 Black. Rep. 977.) It is not material that the parties to the suit should have been parties to the sentence; the only qualification of the rule, I believe, is to be found in *Prudham v. Philips*, (Amb. 763,) where Chief Justice Willes, in the case of a judgment alleged to be *obtained by fraud*, in the ecclesiastical court, took a distinction in favor of a *stranger*, who could not come in and vacate or reverse the judgment, and, therefore, must of necessity be permitted to aver the fraud; but he "held [*140] that the party to the suit was bound by the sentence, in relation to all other persons, and could not give evidence of the fraud, but must apply to the court which pronounced the sentence, to vacate the judgment. It is, therefore, always sufficient, if the one against whom the sentence was offered, was a party.

I forbear particularly to examine the subsequent cases, (Doug. 544. Park, 359, 361, 362,) during our revolution, and since, which, if any doubt could before exist, have unequivocally settled the law in England. The principle on which they are founded, is, I think, sufficiently supported by the antecedent cases. The English courts appear to have viewed those cases in the same light, and without treating the question as *res integra*, have adopted the rule they prescribe. Indeed, from the time of Charles II. to the present period, it appears to have received a steady determination by the highest authorities in their courts. With them it seems never to have been much questioned, and, I conceive, the law with us must be deemed to be equally settled. It may be added, that the same point arose in Pennsylvania, (2 Dall. 51, 194, 195, 270,) and, although not directly decided, Judge Shippen inclined to consider the foreign sentence as conclusive against the insured.

In France, the law is undoubtedly otherwise settled. (Emerigon, 457 to 464. Val. 112, art. 48. See also Rocc. n. 54.) Their courts have adopted a different rule, at an

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early period ; and the authorities on which they proceed, in cases of new impression, would merit great attention and respect ; but, independent of the circumstance that they impose no obligations on our courts, I think they do not comport with the sound interpretation of the contract, nor with the system of our jurisprudence. The English courts, on questions of commercial law, are to be regarded as at least equally enlightened and correct ; and their authority, before the revolution, repeatedly sanctioned and confirmed by subsequent determinations, imposes an obligation which the former do not possess.

[*141] "In every light, therefore, in which I have been able to view the subject, I am of opinion, that the foreign sentence ought to be deemed conclusive against the plaintiff's right to recover on the policy ;

1. From the nature and import of the contract itself, by which I consider the insured to have guarantied his neutrality, and undertaken to maintain it, and, of course, liable to all the perils attending it.

2. Because the condemnation is to be considered as conclusive evidence of the want of neutrality, it being the sentence of a court, not only of a *competent*, but *exclusive* jurisdiction on the subject.

KENT, J. This is an action on a policy upon the cargo and freight of the ship *Astrea*.

The facts are these :

The voyage was from New York to Corunna in Spain, and the ship was described as the good American ship the *Astrea* ; and, previous to the time of signing the policy, the plaintiff, in a written application for the purpose, to the respective defendants, represented the property to be his own. The ship was captured on her voyage by a British frigate, carried into Gibraltar, and, by the court of vice-admiralty there, the ship and cargo were condemned as lawful prize, belonging at the time of her capture, to Spain, or to persons, being subjects of the king of Spain, or inhabiting within the territories of the king of Spain, enemies to the king of Great Britain.

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If the plaintiff is not to be adjudged concluded by the sentence, it is then admitted in the case, to be a fact, that the ship and cargo were the plaintiff's property.

The plaintiff was born a subject of the United Netherlands, and became a citizen of the United States on the 3d day of June, 1793, and has since resided in the city of New York.

Upon these facts, the whole question between the parties turns upon the effect of the sentence of condemnation. *If that is to be deemed conclusive proof of [*142] the facts therein stated, the policy is void, by reason of a breach of warranty, and by reason of a *material misrepresentation*, which led the underwriters to compute the risk upon circumstances which did not exist.

The sentence substantially *falsifies* the representation; for the persons, stated in the sentence as the owners of the property, and the plaintiff, were evidently understood and intended to be different persons.

After the opinion which I have already given upon the question, in the cases of *Ludlow v. Dale*, (1 Johns. Cases, 16,) and of *Goix v. Low*, (1 Johns. Cases, 341,) I might well be excused from entering again upon the subject, unless, in the mean time, I had seen sufficient reason to change that opinion. The question has, indeed, been since presented in a way the most propitious to a liberal reconsideration of its merits. The authorities and the principles they contain, have been examined at the bar, with a diligence and ability, that have greatly aided our researches, and thrown light on the avenues to truth. It seems, then, in a degree, due to the occasion, to the elaborate and anxious care which has been bestowed on the subject, that I should once more, but very briefly, and without recapitulating what I have before said, take some further notice of the argument.

The true point in controversy is not what *ought* to be, but what in fact *was*, the legal effect of a foreign sentence of condemnation, in a case like the present, by the common law, as understood and settled when our revolution began. I shall confine myself, in this opinion, to the examination of this *single* point.

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Let us first inquire what is the effect of a domestic judgment.

It is laid down as a general rule, (Buller's N. P. 244, 245. Amb. 761. Freeman, 84. Str. 733. Harg. Law Tracts, 465, 469,) that whenever a matter comes to be tried in a collateral way, the final sentence of any court, having [*143] "competent authority, is conclusive evidence of the matter so determined, in all other courts having *concurrent* jurisdiction; for, it were very absurd, that the law should give a jurisdiction, and yet not suffer what is done by force of that jurisdiction to be full proof.

It has, however, been made a doubt by some, (Harg. 477; 3 Mod. 231;) whether such sentences be conclusive upon jurisdictions, having concurrent authority, or only *prima facie* evidence of the fact, although I think the better opinion is in favor of their conclusive effect.

But if a matter belongs to the jurisdiction of one court, so *peculiarly* as that other courts can only take cognizance of the same subject indirectly and incidentally, the rule is then more extensive and unequivocal. (Hargrave's Law Tracts, 452, 457, 470, 477.) The latter courts are bound by the sentence of the former, until it be reversed, although it be in a suit *in diverso intuitu*, if it be directly determined, and must give credit to it universally, and without exception.

This rule has been illustrated by the case of sentences in the ecclesiastical courts, touching marriages and wills; in the exchequer, touching the condemnation of forfeited goods; and in the admiralty, touching prizes, in all of which cases, those courts have exclusive jurisdiction.

In respect to the ecclesiastical courts, the authorities are numerous, and have spoke a uniform language from the time of Lord Coke to the present day. In two cases, to be found in his reports, (4 Co. 29, a. 7 Co. 43, b.) the judges determined that they were bound (although it was even against the reason of the law) to give faith and credit to the sentences of the ecclesiastical courts, for *cuiuslibet in sua arte perito est credendum*; and that, if the ecclesiastical judge sheweth

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cause of his sentence, yet, forasmuch as he is judge of the original matter, they shall never examine the cause whether it be true or not.

All the subsequent cases say the same thing. (2 Lev. 14. 1 Freeman, 83. Carth. 225. 1 Salk. 290. Skin. 493. Str. 960, 661. Amb. 761. Harg. Law Tracts, from 452 to 479.)

*This conclusive effect of the sentences of the [*144] spiritual courts applies to *strangers* as well as to parties and privies. They are conclusive evidence of the fact against all the world. (Harg. 457, 471. Bull. N. P. 245.) In one of the cases from Coke, (4 Co. 29, a.) and in the case of *Hatfield v. Hatfield*, (Str. 691. 3 Bro. P. C. 62, S. C.) which was finally determined, on appeal, in the house of lords, in 1725, the sentence was held binding on strangers. In a case before Lord Hardwicke, and in a case before Chief Justice Willes, (Str. 690. Amb. 763,) strangers were allowed to use the sentence against those who were parties.

The same doctrine is established, in respect to condemnations in the exchequer. This fully appears from the case of *Scott v. Sherman*, (2 Black. Rep. 977,) in which it was held by Mr. Justice Blackstone, in a very elaborate argument, and in which all the court concurred, that the condemnation in the exchequer was conclusive; not only *in rem*, but *in personam*; not only as to the property vested in the crown, but as to every other collateral remedy; not only as to the party to the suit, but as to the right owner, although no party, and against all the world. The seizure itself was held to be notice to the owner. (See 4 Term Rep. 161.) The law gives implicit credit to the judgments of competent courts; and it was afterwards observed by Chief Justice De Grey, that the decision in that cause had been the uniform law for above a century. (2 Black. Rep. 1176.)

It seems to be everywhere taken for granted, that the sentences of admiralty courts are equally final.^(b) (1 Show. 6. 3

(b) In *Kindersley v. Chase*, Park. Ins. 490, Sir Wm. Grant said: "It has been clearly settled, from the time of Lord Hale down to the present period, that a sentence of condemnation in a court of admiralty, when it proceeds on

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Mod. 195, note. Harg. 467. 2 Ld. Raym. 893. 1 Ld. Raym. 724. Com. Dig. tit. Admiralty, E. 17.)

the ground of enemies property is conclusive, that the property belongs to enemies, and not only for the immediate purpose of such sentence, but is binding in all courts and against all persons. The sentence of a court of admiralty proceeding *in rem* must bind all parties, must bind all the world." And this doctrine "has been considered equally applicable to questions of warranty in actions on policies as to questions of property in actions of trover." Per Chamber, J. in *Lothian v. Henderson*, 3 B. & P. 513. *Hughes v. Cornelius*, 2 Show. 242.

Sentences of foreign prize courts are received in the courts of England, as conclusive evidence, in actions upon policies of insurance, between the assured and the underwriter on every subject immediately and properly within the jurisdiction of such foreign courts, and upon which they have professed to decide judicially; *Christie v. Secretan*, 8 T. R. 196; *Kendersley v. Chase*, cited above; *Bolton v. Gladstone*, 5 East, 155, 160, and 2 Taunt. 85; *Baring v. Royal Ex. Ass. Comp.* id. 99; *Lothian v. Henderson*, cited above; *Baring v. Claggett*, 3 B. & P. 214; but only on those points; *Christie v. Secretan*, *Fisher v. Ogle*, 1 Camp. 418. *Everth v. Hannum*, 2 Marsh. 72. *Marshall v. Parker*, 2 Camp. 70. *Barzillay v. Lewis*, Park. Ins. 469. *Baring v. Claggett*. *Saloucci v. Woodmas*, Park. Ins. 471. *Pollard v. Bell*, 8 T. R. 444. So in Massachusetts; *Baxter v. New England Ins. Co.* 6 Mass. 277, where all the cases before that time are reviewed by Sedgwick, J.; S. C. 7 Mass. 275. *Buttrick v. Allen*, 8 Mass. 273. *Bissell v. Briggs*, 9 Mass. 462, 464. So in Connecticut; *Stewart v. Warner*, 1 Day, 142. *Brown v. Union Ins. Co.* 4 Day, 179. So in South Carolina; *Groning v. Union Ins. Co.* 1 N. & McCord, 537. S. P. *Bailey v. So. Ca. Ins. Co.* id. 541, n. (b); and see *Jenkins v. Putnam*, 1 Bay, 8; and also *Williamson v. Tunno*, cited below. So held in the Supreme Court of the United States; *Croudson v. Leonard*, 4 Cranch, 434; and see this principle affirmed in *Penhallow v. Doane's admrs.* 3 Dal. 85, 116. So in Pennsylvania; *Brown v. Ins. Co. of Pa.* 4 Yeates, 119; S. C. nom. *Dempsey v. Ins. Co. of Pa.* 1 Binn. 299, in note; but by the act of 1809, it is declared that no sentence of any foreign court, having or exercising jurisdiction of prize, should be conclusive in any case, except of the acts of such courts, provided that nothing in the act should be construed to impair or destroy the legal effects of such sentence on the property, and this is only where such courts are constituted according to the law of nations, and exercise their functions either in the belligerent country or in the country of a co-belligerent or ally in the war; *Oddy v. Bovill*, 2 East, 473; therefore a sentence pronounced by the authority of the capturing power, within the dominions of a neutral country to which the prize may have been taken, is illegal and consequently would not be admissible evidence to falsify the warrant of neutrality. *Donaldson v. Thompson*, 1 Camp. 429. *Havelock v. Rockwood*, 8 T. R. 268. *Case of Flad Oyen*, 8 T. R. 270, n. But such judgment is conclusive only where the essential requisites and for-

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The rule, then, I have mentioned, in respect to do-

malities of judicial tribunals in civilized countries have been conformed to ; *Sawyer v. Maine F. & M. Ins. Co.* 12 Mass. 291 ; and only as to such matters as it clearly and positively decides. *Bailey v. So. Ca. Ins. Co.* 1 Tr. Con. Rep. 381.

" Every foreign admiralty sentence must depend for its operation, upon the jurisdiction of the court pronouncing it. And all the cases agree, that where the doctrine as to the conclusiveness of these sentences prevails, it must be understood with the above qualification. If jurisdiction be wanting, all is wanting, and the whole proceeding will be regarded as utterly null and void. Nor is there any question, that upon both principle and authority, the court, before whom such sentence is sought to be used, has the right of examining freely into the matter, and deciding whether the foreign tribunal which pronounced the sentence had jurisdiction or not. See *Rose v. Himley*, 4 Cranch, 241, 268, *et seq.* Story's Conf. of Laws, 492, *et seq.* *Cherriot v. Foussat*, 3 Binn. 220. *The Ocean Ins. Co. v. Francis*, 2 Wend. 64. S. C. 6 Cowen, 404. *Hudson v. Gustier*, 4 Cranch, 293. 4 Cowen, 523, 524, note. 2 Ev. Poth. 355. *La Nereyda*, 8 Wheat. 108, 168. *Thomas v. Southard*, 2 Dana, 475, 482, 483.

" 1st. Jurisdiction may depend, upon the state of the *res*, on which the sentence was designed to operate. Thus, if by any means whatever, a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that such condemnation would change the property. *Rose v. Himely*, *supra*, per Marshall, C. J. Story's Conf. of Laws, 494. So, if the possession of the *res*, should be actually lost by the captor, as by recapture, escape, or voluntary discharge, the prize courts of the captor would thereby lose jurisdiction. 1 Kent's Comm. 359, 3 ed. *Hudson v. Guestier*, 4 Cranch, 293. *Jenkins v. Putnam*, 1 Bay, 8, 10. But the possession of the captor in a neutral port, the port of an ally, or of a nation under the control of the sovereign of the captor, is the possession of such sovereign, and the *res*, though remaining there, are within the jurisdiction of the courts of the captor. 1 Kent's Comm. 358, 359. Id. 104. *Hudson v. Guestier*, *supra*. *Williams v. Armroyd*, 7 Cranch, 432. *The Henrick and Maria*, 4 Rob. Adm. Rep. 43. 6 id. 138, note. *Cherriot v. Foussat*, 3 Binn. 220. *Page v. Lennox*, 15 Johns. 172. *Sheaff v. Seventy hogsheads*, Bee's Adm. Rep. 163. But see *Wheelwright v. Depeyster*, 1 Johns. 471.

" 2d. The jurisdiction of a foreign admiralty court, may depend upon its national character. Thus, the prize court of an ally of the captor has no right to condemn, 1 Kent's Comm. 103, 2d ed. ; and *a fortiori*, the court of a neutral cannot.

" 3d. The jurisdiction may, also, depend upon the place where the court sits. Thus, the prize court of the captor cannot act in a neutral territory, and if it do so, its proceedings will be deemed unauthorized and void. *Glass v. The sloop Betsey*, 3 Dall. 6. 1 Kent's Comm. 103, 2d ed. and the cases there

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mestic judgments, has received all the sanction that a

cited. See also, the cases cited in the text. But the prize court of the captor may sit in the territory of an ally. 1 Kent's Comm. 103, 2d ed.

"4th. Jurisdiction may also depend upon the manner in which the court is constituted. Thus, where a condemnation was pronounced by a pretended Court of Admiralty at Galveztown, constituted by Commodore Aury, under the alleged authority of the Mexican republic, the Supreme Court of the United States said, that 'it did not recognize the existence of any Court of Admiralty, sitting at Galveztown, with authority to adjudicate on captures; nor had the government of the United States hitherto acknowledged the existence of any Mexican republic or state, at war with Spain; so that the court could not consider as legal, any acts done under the flag and commission of such republic or state.' *The Neuva and Liebre*, 6 Wheat. 193. 'I admit,' says Washington, J. in *Snell v. Fausset*, 1 Wash. C. C. Rep. 271, 274, 'that, where we find a condemnation by a foreign court, of the origin of which we are not informed, we ought to presume it a legitimate tribunal. But, when the source of its authority and constitution is stated, we ought to examine it, and if it be contrary to the usual mode of constituting courts, it shifts the burden of proof upon the party who would support the condemnation; particularly, as it is more easy to prove the legitimacy of the court, than to disprove it. We know that the appointment of courts is, in all civilized countries, by the sovereign power. This, however, may be lodged by the sovereign, in a subordinate civil officer; nay, in a military commander, if the sovereign so chooses. But this latter mode is so unusual, that when we hear of a court being constituted by a military commander; and particularly, where it is not clear that he was, at the time, commander-in-chief; it destroys the presumption of its legality, so as to require the party who would support the condemnation, to show that the court was instituted by lawful authority. S. C. 3 Binn. 239, note.

"'But even where the authority of the court has clearly emanated from the sovereign power of the nation, it is going too far to say, that its jurisdiction cannot be questioned. All nations are on an equality. If any one, then, should undertake to erect a jurisdiction in manifest violation of justice, general convenience, and long established principles, is this to be submitted to? Suppose a belligerent should direct officers to hold a prize court within the dominions of a neutral, without that neutral's consent; can it be doubted, whether the jurisdiction of such a court may be called in question? But, it is answered, that it is the business of the government, and not of courts of justice, to seek redress in case of these irregular acts of sovereigns. This answer does not appear satisfactory. Governments may certainly interfere with great propriety. But what are the courts to do, when the subject is brought before them in the course of the administration of justice? They cannot refuse to decide, and have no rule to govern their decisions, but the law of nations.' *Cherriot v. Fausset*, 3 Binn. 220, 251." Cowen & Hill's Notes to 1 Phill. Ev. 886. Id. 880, *et seq.* where the subject of sentences in courts of admiralty and foreign courts is fully considered.

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continued train of decisions could possibly give it.(c)

If the sentence profess to be made on particular grounds which are set forth in the sentence, but which apparently do not authorize the condemnation, the sentence will not be conclusive as to such facts. *Calvert v. Bovill*, 7 T. R. 523. *Pollard v. Bell*, 8 id. 444. Or if the sentence has not decided the question of property nor declared whether it be neutral, but condemned the property or prize, solely on the ground that the ship had violated an *ex parte* ordinance to which the neutral country had not assented, or on the ground of a foreign ordinance against the laws of nations, such a sentence though conclusive of the question of prize or no prize, would not be conclusive of the fact whether or not the ship were neutral. *Pollard v. Bell*, cited above. *Bird v. Appleton*, 8 T. R. 562. *Baring v. Claggett*, cited above. *Bolton v. Gladstone*, id. If a ship insured is merely represented as neutral, a sentence of a foreign court of admiralty is not evidence to falsify the representation; *Von Tungder v. Dubois*, 2 Camp. 151; unless it appears that the condemnation went on that ground. *Bernardi v. Motteux*, 2 Dougl. 575. *S. P. Salucci v. Johnson*, 4 Dougl. 424. "It is well established that in order to conclude the parties from contesting the ground of condemnation in an English court of law, such ground must appear clearly upon the face of the sentence; it must not be collected by inference only or left in uncertainty;" Per Tindal, C. J. in *Dagleish v. Hodgson*, 7 Bing. 504; see also *Fisher v. Ogle*, 1 Camp. 418; *Calvert v. Bovill*, 7 T. R. 523; *Williamson v. Tunno*, 2 Bay, 388; *Blacklock v. Stewart*, 2 Bay, 363; thus when the decree stated that the vessel was condemned for a rescue from a belligerent captor or otherwise the assured was permitted to give evidence disproving the fact of such rescue. *Robison v. Jones*, 8 Mass. 536.

The decision of the Court of Errors in the principal case has been adhered to in all the subsequent cases in New York. In the *New York Firemen Ins. Co. v. De Wolf*, 2 Cowen, 56, the Court of Errors refused to hear it questioned by counsel in argument. The general rule as to the effect of the sentences of foreign prize courts in this state, is thus stated by Chancellor Walworth in *The Ocean Ins. Co. v. Francis*, 2 Wend. 64, 68. "The sentence of a foreign court of admiralty, condemning the property, as a good and lawful prize, according to the law of nations, is conclusive to change the property, but is only a *prima facie* evidence of the facts on which condemnation purports to have been founded, and in a collateral action, such evidence may be rebutted by showing that no such facts did in reality exist."

(c) Mr. Smith, in his learned note to *Doe d. Christmas v. Oliver, Same v. Oliver and others, Dutchess of Kingston's case, Hughes v. Cornelius, and Trevivan v. Lawrence et al.* 2 Smith's Leading Cas. 417-437, remarks that "Decrees of the High Court of Chancery, which, although a superior court, seems not to be, at least upon its equity side, a court of record, (see Co. Litt. 260.) stand, nevertheless, on the same level with the judgments of the three superior courts of common law. It is laid down in Buller's Nisi Prius, 243, that 'a decree in chancery may be given in evidence between the same parties, or any claiming under them, for their judgments must be of authority

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We are next to see whether the same rule, as appearing to be directed by the same reason, has not been applied with equal uniformity to foreign judgments.

in those cases where the law gives them a jurisdiction ; for it were very absurd that this law should give them a jurisdiction, and yet not suffer what is done by force of that jurisdiction to be full proof. In the case of *Manchester Mills*, Dougl. 222, note 13. it was laid down by Lord Mansfield, that a "decree establishing a custom to send corn to be ground at a particular mill ought not to be controverted, nor the existence of the custom litigated any further before a jury ; and that such decree bound all persons of the same description with the original defendant." See also *Trotter v. Blake*, 2 Mod. 231.

"Judgments of the courts ecclesiastical are of two sorts—in *rem* and *inter partes*. A grant of *probate* or of *administration* is in the nature of a decree *in rem*, and actually invests the executor or administrator with the character which it declares to belong to him. Accordingly, such grant of probate or administration is conclusive against all the world. *Noel v. Wells*, 1 Lev. 235. 236. It may, indeed, be shown that the grant was revoked, for that is the further act of the same court, or that it was forged, for that shows it not to be the act of the court at all, or that it was granted by a court having no jurisdiction, for then it is a nonentity. But it cannot be shown that the testator was mad, or that *the will* was forged, for those facts might have been alleged in the Ecclesiastical Court in opposition to the grant of probate or administration. *Noel v. Wells*, *ubi supra*. On this ground it was that the Queen's Bench, in *Allen v. Dundas*, 3 T. R. 125, held, that payment of money to an executor who had obtained probate of a forged will, which was afterwards repealed, is a discharge to the party paying it ; since, the probate being conclusive evidence of the executorship as long as it remained unrepealed, the debtor would, when he was called upon to pay, have had no defence against an action, brought by the executor under the forged will. Mr. J. Buller in that case said, 'The first question to be considered is, *what is the effect of a probate* ? It has been contended by the counsel, first, that it is not a judicial act ; and, secondly, that it is not conclusive. But I am most clearly of opinion that it is a judicial act ; for the Ecclesiastical Court may hear and examine the witnesses on the different sides whether a will be or be not properly made. That is the only court which can pronounce whether or not the will is good, and the courts of common law have no jurisdiction over the subject. Secondly, the probate is conclusive till it is repealed ; and no court of common law can admit evidence to impeach it. Then this case was compared to a probate of a supposed will of a living person : but, in such a case, the Ecclesiastical Courts have no jurisdiction, and their probate can have no effect ; their jurisdiction is only to grant probate of the wills of *dead* persons. The distinction in this respect is this,—if they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places ; if they have no jurisdiction, their whole proceedings are a nullity.'

"On the same principle, a sentence in a matrimonial suit is conclusive, for

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*The most ancient case to be met with in the English books, is the case of *Hughes v. Cornelius*. [*145]

It is an adjudication upon the *status* of the parties, see *Da Costa v. Villa Real*, Str. 961; *Bunting's case*, 4 Co. 29; *Kenn's case*, 7 Co. 42; and see the instances of sentences of deprivation collected by Lord Holt in his judgment in *Phillips v. Bury*, 2 T. R. 346. But it is otherwise when the suit is for a justification of marriage; for there the spiritual court does not intend to affect the *status* of the parties by its decree, but merely to prevent one party from falsely asserting that a marriage happened under certain specified circumstances. See the *Duchess of Kingston's case*, and *quare* as to *Jones v. Bow*, Carth. 225.

"It need hardly be added, that such sentences do not, any more than the records of the superior courts, conclude as to matters which may or may not have been controverted. See *Blackham's case*, 1 Salk. 200. *R. v. Inhab. Wye*, 7 A. & E. 772.

"It is laid down in the *Duchess of Kingston's case* that the decree of the spiritual court is not conclusive in a criminal proceeding; and this is stated to be upon grounds of public policy. It seems difficult, however, to support this view on principle. A sentence in the spiritual court *inter partes* could not indeed be conclusive in a criminal proceeding, because the parties litigant would not have been the same in both courts. But it is difficult to see how a decree *in rem*, which operates upon the *status* of the individual and renders the fact what the court adjudicates it to be—it is difficult, I say, to see how such a sentence can be otherwise than conclusive. In the *Duchess of Kingston's case* it was unnecessary to decide this point, the sentence being *in personam*. In *R. v. Buttery*, R. & R. C. C. 342, a probate was held not to be conclusive evidence that the party who obtained it had not forged the will, which may at first sight seem inconsistent with the doctrine in *Noel v. Wells*, 1 Lev. 236, above cited, viz. that the party in a civil action cannot avoid the probate by showing the will to be forged. But, on consideration, the cases will appear to be consistent; for, in the civil suit, the evidence is offered for the purpose of showing that the party who obtained probate *did not thereby become executor*, which character the spiritual court has adjudged him to possess; but, in the criminal case, the party offering the evidence admits the probate to be valid till repealed, admits the defendant to have thereby become executor, but merely seeks to show what means he used in order to become so; which is no more than if he sought to prove that in the affidavit in which the prisoner verified the scripts he had committed perjury. On the other hand, in *R. v. Grunden*, Cowp. 315, a sentence of expulsion from a college was held conclusive in answer to an indictment for an assault on the express ground that it resembled a sentence of the spiritual court.

"In *R. v. Vincent*, 1 Str. 481, indeed, the doctrine of the conclusiveness of the sentence was carried to a greater extent, and it seems to be impossible to support that case consistently with *R. v. Buttery* and *R. v. Macnamara*, R. & R. C. C. 342; the latter decisions are those which must be now regarded

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(Raym. 473. 2 Show. 242. Skinner, 58, S. C.) Although the special verdict in that case falsified the sentence of con-

law, being not only later in date, but the decisions of nine judges; whereas *R. v. Vincent* was decided by C. J. King alone.

"The proposition that a judgment *in rem* is conclusive in a criminal proceeding may, at first sight, appear to involve hardship, but will not, I think, appear to do so when we shall have fully considered the manner in which its effect is limited by holding it conclusive only on the point decided.

"With regard to Courts of Admiralty, the rule with regard to their sentences is the same as that regarding the sentences of spiritual courts where their proceeding is *in rem*;—for instance, when a vessel is condemned *as prize*, it seems never to have been disputed that the sentence is conclusive upon all the world. See the notes to *Le Caux v. Eden*, Dougl. 614, in which is set out the elaborate judgment in *Lindo v. Rodney*, containing a learned inquiry into the nature of the Prize Court of Admiralty, and the distinction between it and the Instance Court.

"The sentence of a college visitor depriving or expelling is conclusive; and it is apprehended is so against all the world, since the visitor's proceeding is *in rem*, and he pronounces operatively upon the *status* of the party deprived; see *Phillips v. Bury*, Skinn. 417; Lord Raym. 5, which was decided by three judges, contrary to the opinion of Lord Holt, which opinion was, however, afterwards uphold on error. His lordship's argument is fully given in 2 T. R. 346, in which he assimilates the case to that of a sentence of deprivation by the Ecclesiastical Court, and cites numerous authorities to show that that has always been conclusive. In *Phillips v. Bury*, the sentence of deprivation passed upon the old rector was held conclusive in an ejectment by the new rector. In *R. v. Grunden*, Cowp. 315, the same point was decided upon an indictment for assaulting a fellow-commoner of Queen's, (who had been expelled,) and turning him out of the college garden.

"On the same principle the sentence of a court martial seems to be conclusive. See *Rex v. Suddis*, 1 East, 306; for this court, to use the words of Lord Loughborough, in *Grant v. Gould*, 2 H. Bl. 100, 'being established in this country by positive law, the proceedings of it must depend upon the same rules with all other courts which are instituted and have particular powers given to them.' See *In re John Walter Poe*, 5 B. & Adol. 681. *Hannaford v. Huon*, 2 C. & P. 148, where the party relying on it having neglected to place it on the record, it was held on that account not to be an estoppel.

"Sentence of deprivation by a visitor appears to differ from the other cases above touched upon in this respect, viz., that it is the sentence of a tribunal which has in many instances been created by a private individual. This does not, however, seem to alter the principle; for, though no private individual can create a court whose sentence shall have operation on the persons or properties of others, yet there is no reason why he should not create one having operation on his own; unless, indeed, he introduce some term, inconsistent with public policy.

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demnation in the French admiralty ; yet the court admitted the sentence to be true ; and although the suit was trover, in which, nothing but the direct effect of the sentence came necessarily into view ; yet the court, in giving judgment, laid down this general doctrine, applicable equally to collateral effects ; viz. that they ought to give credit to foreign sentences of admiralty, and take them to be according to right, and not to examine into their proceedings ; that this was agreeable to the *law of nations*, and sentences in courts of admiralty ought to bind generally, according to that law ; that if the party was aggrieved he ought to petition the king, it being a matter of government, and if there appear cause, he will instruct his liege ambassador, and on failure of redress, will grant letters of reprisal.

This decision, and the principle contained in the judgment, were afterwards cited and sanctioned by Lord Holt, and again by Lord Hardwicke, and, lastly, by Professor Wooddson, in the course of his Vinerian lectures. (Carth. 32. 1 Atk. 49. 2 Wood. 456.)

A similar doctrine has been repeatedly advanced, and whenever the occasion arose. Instances of this are to be met with in the successive decisions of the Chancellors Nottingham, King, and Hardwicke. (1 Vern. 21. 2 Str. 733. 1 Vezey, 159.)

“ Thus, on the same ground on which a visitor's sentence is supported, stands the case of the trustees of a school dismissing the schoolmaster for misconduct. *Doe v. Haddon*, 3 Dougl. 310 ; and the ordinary case of an arbitrator, whose forum is a domestic one, constituted by the parties themselves who are bound by its award.

“ It has never, that I am aware of, been decided, unless indeed *Hannaford v. Hunn* be a decision to that effect, that, where a decree in chancery, a sentence of the Ecclesiastical Court, or any other matter *quasi of record* is conclusive, any necessity exists of pleading it in order that it may be held so. This furnishes another argument against the reasoning on which *Goddard's case* and *Veight v. Winch*, are thought by some to have proceeded ; for surely the obligation of the jury to find a true verdict is equally great, whether the matter offered as conclusive be a decree or a judgment. The rules which now regulate pleadings will probably compel parties to place them on the record oftener than heretofore.” 2 Smith's Leading Cases, 445, *et seq.* See also Cowen & Hill's notes to 1 Phill. Ev. 854-880.

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In the case of *Gage v. Bulkeley*, (Ridgeway, 266, 267,) before Lord Hardwicke, Sir D. Ryder, who was then attorney general, laid down the rule in its fullest latitude, and as being well established. He said that foreign judgments were received in England as conclusive evidence, and had the same regard paid to them, for the sake of justice and public convenience, as sentences given in the courts of admiralty, or ecclesiastical courts at home; and he cited the case of *Hamden v. The East India Company*, [*146] which was *determined upon appeal, in the house of lords; and on the ground, that the sentence of a Dutch admiralty was conclusive evidence, it being *res judicata*, and could not be unravelled or re-examined. Although what he said was merely *arguendo*, yet, coming from such an eminent counsel, and appearing to be taken for granted by the court, it is pretty good evidence of the prevailing sense on the subject.

Here we may also notice the answer of the judges (of whom Sir D. Ryder was one) to the Prussian memorial, as being a document of very high authority, and bearing on the question before us. (1 Col. Jurid. 101, 102, 106.) It is there stated, that prize courts are governed by the maritime law of nations; that in every country there is a court of review, to which the parties who think themselves aggrieved, may appeal; that if no appeal be offered, it is an acknowledgment of the justice of the sentence by the parties themselves, and is conclusive; that captures have been immemorially judged of in that way, in every country of Europe, and with the approbation of the powers at peace; that every other method and trial would be impracticable and unjust; and that, if prize courts proceed contrary to the law of nations, and treaties, *in re minime dubia*, then, and not till then, the neutral has a right to complain.

This answer, and the principle contained in the case of *Hughes v. Cornelius*, may be considered as a correct commentary on the law of nations, relative to the effect which judicial sentences in one country are to receive in the courts

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of another. (Grotius, 1, 3, c. 2, s. 5. Vatt. 1, 2, s. 84, 85. Martens, 104, 105. Erskine's Institutes, vol. 2, 735.)

After such a repeated and general recognition of the principle, we are prepared to expect an application of it (for that is all that is now wanted) to a case precisely the same with the one before the court. We do, accordingly, find it stated as law, in Buller's *Nisi Prius*, (p. 244,) that in an action upon a policy of insurance, with a warranty that the ship was Swedish, the sentence of a French "admiralty" [147] court, condemning the ship as English property, was held conclusive evidence. The same case was previously stated in the *Theory of Evidence*,^(a) (p. 37,) to have been decided; and Park give us a particular report of another decision of the like kind, before Lord Mansfield, at the sittings after Hilary Term, 4 Geo. III. in the case of *Fernandez v. De Costa*. A ship was insured, and warranted a Portuguese; she was libelled, and condemned in a French court, as not being Portuguese, and although the plaintiff gave partial evidence of her being Portuguese, yet, when the defendant produced the sentence, it concluded the cause.

Where, then, can we discover a doubt, as to what was the law at the time of our revolution? Upon what ground can we pause, even to raise a conjecture, whether the court of King's Bench, in the case of *Bernardi v. Motteux*, (Doug. 575,) being the first cause after the year 1776, created a new rule, when even the counsel for the plaintiff, at the very outset of the argument, admitted, that if the sentence of the French admiralty had proceeded on the ground of the property not being neutral, the plaintiff would have been concluded.

Nor do I think that the English decisions, since the year 1776, are to be thrown *wholly* out of view, although they are confessedly of no binding authority.

In addition to the consideration of the well known character of their judges, we are to observe, that their tribunals and ours, study and pursue the same code of law and equity; and that they are certainly not more liable than we ourselves, to misapprehend the authentic records and oracles of the

(a) Published in 1761.

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common law. If the question, therefore, were otherwise involved *in doubt*, a series of uniform decisions in the English courts, for the last twenty years, cannot but be considered, and that, too, without being unduly addicted *jurare in verba magistri*, as a very sufficient cause to remove it. (Doug. 575, 610, 614 to 617, 705. *Barzillay v. Lewis, De Souza v. Ewer*, and *Saloucci v. Woodmason*, cited by Park. 7. Term Rep. 523, 681, 705. 8 Term Rep. 196, 232.)

[*148] *Having thus ascertained, at least to my satisfaction, that by the law, as it stood in 1776, a sentence of condemnation abroad, on a direct point in question, is, in a collateral suit by the insurer, conclusive evidence of a breach of his warranty, so that no evidence can be admitted to impeach it, I have done all that I undertook to do. I might here rest the argument. Whatever opinion may be entertained, as to the justice or policy of the rule, is not to the purpose. Our duty is *jus dicere, non jus dare*. I may be mistaken, but it appears, however, to me, that all the reasons which have established the rule relative to domestic courts, having exclusive jurisdiction of a subject, apply with *peculiar force* to a case like the present.

Courts of law are inadequate to determine the question of prize; and to overhaul the sentence is in reality trying that question. The circumstances that go to constitute prize, are oftentimes complex. The property may be deeply masked, the papers double, or every requisite paper may be regular, and yet the conduct of the master such as to cause the property to *lose* its privilege of neutrality. None but a court clothed with the mode of proof, the summary powers, the enlarged discretion of a prize court, can seize and sift every circumstance. The maritime law of Europe has, therefore, very wisely established a peculiar court, for the exclusive jurisdiction of prize. It is there that the assured should vindicate his property, and if aggrieved, he should carry his appeal to a court of review. There is great weight in the observation, that this is the true construction of the engagement, on the part of the assured. By representing, or warranting his property to be neutral, the assured undertakes,

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not only that it is so in *fact*, but that it shall be *entitled* to neutral privilege, *throughout the voyage*. (8 Term Rep. 234, 444.) A *warranty* of neutrality, means that the ship shall maintain a neutral conduct, and not forfeit it during the voyage. To construe the engagement to be *less* than that, is in a great degree to render it idle and nugatory. "To implement this warranty," says a very [*149] sensible writer on insurance, (Miller, p. 496,) "the ship or goods must be neutral, *in conception of that nation from whom danger of seizure is apprehended*." On such a representation, or warranty, the insurer lays out of view the risk of loss, by reason of the non-neutrality of property. That risk the assured takes upon himself, and having in his hands, exclusively, all the *means* to do it, he is bound to make good his *avermant*, whenever, and wherever the neutrality of the property, or its privilege as such, is called in question. If he fails to do it, he must bear the loss; and if foreign sentences were liable to be re-examined here, I should still incline to think, that in the case of an *express warranty*, the assured, and not the insurer, takes upon himself the risk of the condemnation, *right or wrong*. Whether that would, or would not be the case, on a *representation* merely, I am not as yet prepared to say; and, therefore, in those suits, where there was no warranty, but only a representation, I should choose to rest my opinion, entirely on the first ground, of the faith due to the foreign sentence.

The result of my opinion, accordingly, is, that the plaintiff is not entitled to recover in this cause, beyond the return of his premium.

BENSON, J. The principal inquiry in this case is respecting the effect of a *foreign* condemnation; the property in the goods condemned being intended, in the insurance of them, as neutral, is not the condemnation conclusive against the assured? This question has heretofore come before us, but until the arguments which have taken place in the present cause, it does not appear to me to have been so fully examined as the difficulty and importance of it require.

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A condemnation may be viewed, as consisting in its cause and in its principles, as to be discriminated from each other; and the principles may be divided into those which relate to the law, and those which relate to the fact, comprehending in the fact, the proofs.

[*150] *The distinction between the cause, and the principles of a condemnation is exemplified in a case, read on the argument from a late English reporter, (7 Term Rep. 681, *Geyer v. Aguilar*,) where one of the judges distinguishes between them as here intended. He thus expresses himself: "The ground on which the courts of France proceeded, was, that this was a capture of *enemy's property*; and it certainly is not contrary to the law of nations, to condemn a ship on that *ground*. Whether or not those courts arrived at that conclusion by proper means, I am not at liberty to inquire." This is as much as if he had said, the cause of the condemnation, as declared by the courts in France, is that the ship was enemy's property, and which is a sufficient cause of condemnation by the law of nations; but what were the *principles* of the condemnation, namely, what were the proofs, or what was the fact, as found by those courts from the proofs, or what was the law as adjudged by them to arise from the fact, I am not at liberty to inquire.

Insurances may be divided into general and special. A general insurance is where the perils insured against, are such as the law would imply from the nature of the contract of a marine insurance considered in itself, and supposing none to be expressed in the policy. A special insurance is where, in addition to the implied perils, farther perils are expressed in the policy; and they may either be specified, or the insurance may be against *all* perils.

We have had an instance of each kind of these special insurances; of the latter, in the case of *Goir v. Knox*, (1 Johns. Cases, 337,) "where, besides the usual risks enumerated in printed policies, it was declared, by a clause in *writing*, that the assurance was to be against *all* risks." And of the former, in the case of *Gardiner and others v. Smith*, (1 Johns.

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Cases, 141,) where the insurance was against the risks, among others, "of *contraband and illicit trade*," and the goods were seized at Jamaica, while landing, and condemned as contraband and illicit, by the law of that place; and cases may be supposed, where "although the property is insured as neutral, the insurer may, nevertheless, expressly take on himself the peril of condemnation, for breach of blockade, or for any other specified or enumerated cause; and in every such case, should there be a condemnation, the assured must be allowed to show, either by the condemnation itself, if it furnishes the requisite evidence, and if not, then by such matter extraneous to it, as, under the circumstances of the case, may be admissible in evidence, that the condemnation was for some *one* of the causes specified in the policy; and so far, and to that intent, doubtless, the condemnation is examinable in the suit, by the insured against the insurer. [*151]

The cases at bar, are, as it respects the perils of condemnation, cases of general insurance, as here explained.

Where the property is insured as neutral, the law intends not only that the neutrality, as an ingredient or quality in the property or ownership of the goods, then exists, but likewise, that it shall be preserved during the continuance of the insurance; and, consequently, that there shall not be any act or omission, either by the assured himself, or by others, whose acts or omissions may in that respect be deemed to affect him, to forfeit it; and the neutrality constitutes, as it were, a *title*, the existence and preservation of which, either in himself, or in the other persons, if any, on whose account the insurance may be made, or for whose benefit it may, in consequence of a subsequent transfer of the goods, be to enure, the assured is deemed to warrant; and this warranty, from the assured to the insurer, is a condition of the insurance, or the indemnity from the insurer to the assured.

Every condemnation is either *rightful* or *wrongful*. If the captured goods, being duly defended in the court of the captors, by alleging and proving the title of the assured, as

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above defined, should, notwithstanding, be condemned, the condemnation will be wrongful. Every other condemnation is to be taken as rightful, including a condemnation by default, no person appearing to defend the goods. [*152] *Where the condemnation is wrongful, it must be attributed either to the error of the *judge*, as it relates to the law, or as it relates to the fact as deduced from the proofs; or to the error of the witnesses, as it relates to the proofs, in testifying differently from the truth; and whether the error, either of the judge or witnesses, be innocent or wilful, can never affect the question, whether the assured hath or hath not a right to controvert the condemnation.

If the assured has any such right, he must have it either limitedly, to controvert the principles which relate to the law, and not those which relate to the fact; or those which relate to the fact, and not those which relate to the law; if he is to controvert those which relate to the fact, still he is to be *confined* to the proofs as they were before the judge, by whom the condemnation was pronounced; or he must have the right *unlimitedly*, or, as it is expressed in the case of *Hughes v. Cornelius*, (2 Show. 232,) to controvert the condemnation, "*at large*."

It will readily be perceived, that as the principal question, whether the assured is, or is not to be concluded by the condemnation, may be differently decided; so will the situation of the insurer be varied from certainty of safety, to the mere expectation or possibility of it. If the condemnation is to be conclusive against the assured, then, however, there may have happened a "*capture, a taking at sea*," and so the case within the very terms of the policy; yet if, further, there has been a condemnation of the goods, the insurer is safe in an absolute sense; but if the assured may controvert the condemnation, the safety of the insurer then becomes uncertain, of course; in like manner, though in less degree, may the situation of the insured be varied, as the several questions respecting the limitations of the right of the

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assured to controvert the condemnation, may also be differently decided.

In some cases it may be more favorable for the insurer, that the assured should controvert the law and not the fact. In others, again, that he should controvert the fact and not the law; and it must ever be most favorable to [*153] the insurer, that the assured should be precluded from producing *new* proofs; and this difference of situation must be viewed as material, in the greater number of cases, which probably will happen; not only so, but some may easily be conceived, where, as it respects the certainty, or possibility, that the assured can, or cannot succeed in showing the condemnation to be wrongful, may wholly depend on a different decision, one way or the other, of these questions, taken singly. Before, therefore, it can be declared that the right of the assured to controvert the condemnation is limited, the rule whereby *some* of the limitations of it here suggested are to be adopted, and others to be rejected, ought to be shown. It may, however, be safely asserted, that no such rule exists. The limitations themselves, or the distinctions, that where a judgment is alleged, the party against whom it is alleged may controvert it, as to the law, but not as to fact; or as to fact, but not as to the law; and if as to the fact, that he is still to be concluded as to the proof, are not known in the law; and I cannot discern them, as to be inferred from any thing peculiar in the contract of insurance; so that the right of the assured to controvert the condemnation not being susceptible of limitation, if, therefore, he has the right, he must have it, unlimitedly, or to controvert the condemnation *at large*.

It is now to be stated, that where the property is insured as enemy's property, and there is a capture by an enemy, the other belligerent party, it is inevitable that the goods will be actually and rightfully condemned. They are as much lost to the assured as if they were captured by a pirate; and they can never happen to be recovered by him except by recapture; and he may, in such case, abandon instantly on the capture. But where the property is insured as neutral,

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there are means, which, as to be distinguished from the forcible or physical means of recapture, may be denominated *moral means*, whereby, until a condemnation shall have taken place, it is *possible* the goods may be recovered.

[*154] *There may be a claim and defence of them in the court of the captor. Although it is stated as *possible* only that the goods may, by a defence of them, be recovered; yet, if it was requisite to the argument, it might be stated as the intendment of law that it is *probable*; for if the title of the assured should be duly alleged and proved, and the goods should, notwithstanding, be condemned, the condemnation, as has been already stated, must then be attributed to the error, either of the judge or the witnesses, and the law will never presume error *beforehand*. If, however, there is a *possibility* only, that, by a defence of the goods, a condemnation of them may be prevented, it is sufficient to make it the duty, either of the assured or the insurer, to defend them, or to bear the loss, if they should be condemned undefended; but it will be perceived the law can never impose it on the insurer to defend them.

Where lands are granted with warranty, if the grantee is sued by a person, claiming a better title than the title of the grantor, he may, as it were, abandon to the grantor; he can compel him to appear in court, and defend the land; he may *vouch* him, and thereby substitute him as the defendant to abide the event of the suit, "*for loss or gain*;" and he is the party to be presumed best cognizant to the title. Such is the rule in a case of a warranty, in the nature of a general contract of indemnity, from a grantor to a grantee; but if the assured may abandon to the insurer on capture, and impose the defence of the goods on him, the rule will be reversed; the warrantor may then substitute the warrantor, as the defendant, and the defence of the title will then be imposed on the party to be presumed not only least *cognizant*, but even wholly *ignorant* of it.

The warranty in grant of land being an indemnity against the acts of others claiming by title, and consequently not against entries by persons not so claiming, nor against as-

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sumptions of the land by the public authority of the state, nor as to any matter which may happen to exist thereafter ; it may be said to be an indemnity against title *only, and not against casualty ; and, accordingly, [*155] if there should be a judgment against the title of the grantor, whether rightful or wrongful, he is alike held to indemnify the grantee for the loss of the land ; but where the property is insured as neutral, the warranty of the title, so far from being by the insurer to the assured, it is by the assured to the insurer ; the insurance can be a warranty, or an indemnity, not against title, but against casualty only ; against tortious acts of private persons, and so unauthorized by law, or the acts of the state, such as reprisals, embargoes, and impressments ; the acts, in neither case, however, proceeding on a supposed total absence, or a defect, or forfeiture of the title, as warranted by the assured. Another consequence, therefore, of a supposed right in the assured to abandon, on the capture, and impose the defence of the goods on the insurer, will be, that the insurance will thereby be essentially changed from being an indemnity against casualty only, to be also an indemnity against title, and against a want of that very title, which, as has been stated, the assured warranted to be existing, and that it should be preserved.

Further, if the assured may abandon on the capture, he is entitled also, to sue for the loss, and the insurer must, accordingly, litigate the suit, in expectation that it may be in his power to prove either that the property was not neutral, or that the neutrality had been forfeited, and so a breach of the warranty, and involving as a consequence, that the goods may be rightfully condemned ; or he must pay the loss voluntarily, and also instantly ; any credit allowed on the policy being wholly of special or positive contract or regulation, and not arising from the insurance considered in itself. If he litigates the suit on the policy, he must relinquish a defence of the goods in the court of the captor, or expose himself to the palpable incongruity of insisting, in the suit by the assured, that the goods may be rightfully condemned,

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and of insisting, at the same time, in the suit by the [*156] captor, that they are neutral property ; *that the neutrality has been preserved, and, therefore, that they cannot be rightfully condemned. On the other hand, if he voluntarily pays the loss, he then precludes himself from afterwards alleging a breach of warranty ; for, although I forbear from giving an opinion whether the insurer can or cannot recover back the money paid for a loss, as having paid it, not knowing at the time, certain facts, which, if he had known, he might thereby have discharged himself from the insurance ; yet, I have no difficulty in declaring, that the facts must be such as it may be supposed he could not be so apprized of them, as to be put on an inquiry, or to be on his guard respecting them, which, however, can never be said to be the case, where goods, being insured as neutral, are captured by a belligerent ; for it is to be intended, as will be more particularly stated hereafter, that they were captured on the ground of being enemy's property, although insured in the name of a neutral. If the assured, therefore, will, notwithstanding, voluntarily pay the loss, he will then be deemed for ever to have waived or renounced his right to allege the breach of warranty. The case will be within the general rule, that if a party shall omit to allege a fact, existing at the time, and whereby he might have defended himself against a recovery, he shall not, as against the other party in the suit, be allowed to avail himself of it thereafter. This rule was recognized in the court of errors, in the case of *Le Guen v. Gouverneur and Kemble*, 1 Johns. Cases, 436, where the appellant having placed goods in the hands of the respondents, as his agents, to be sold, and having himself made a contract for the sale of them to Gomez & Co. but leaving the sale still to be perfected by the respondents, the notes given in payment, were, accordingly, made to them in their *own* names, and the vendees having, before the notes became payable, proceeded to France with the goods ; he demanded from the respondents an authorization, to receive there, whatever sum should remain of the proceeds of the goods, so sold on his account, to the above vendees,

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after first deducting *and reserving at their disposal, [*157] such sum as should be completely sufficient to cover them, for the general balance of their account ; and they refusing to give him the authorization, he brought a suit against them in this court for the refusal, as for a breach of orders, whereby they had become instantly liable for the value of the *whole* of the sale, and on a special verdict he had judgment, and to the amount so claimed by him. The respondents thereupon filed their bill in the court of chancery, to the effect of a suit at law, to *recover back* a payment, to enjoin him from proceeding on the judgment, suggesting, that subsequent thereto, on the trial in the suit which they had brought on the notes against the vendees, a verdict had been found for the defendants, on the sole ground of a fraud having been practiced by the appellant in the sale of the goods, by affirming or warranting them to be of a better kind or quality than they were, and the chancellor ordered an issue at law to try the fraud. A question, however, was reserved by the counsel of both parties, to be determined as a preliminary to the trial, whether the respondents were not precluded by the antecedent circumstances, from insisting upon the alleged fraud as a ground of relief? The chancellor decreed they were not so precluded, and confirmed the order for the trial, and on the appeal, the decree was reversed, and the respondents' bill in the court of chancery was ordered to be dismissed. If, therefore, the assured may abandon on the capture ; and as the insurer must accept the abandonment, and pay the loss, then, although it might afterwards be proved *undeniably*, in the court of the captor, that the property was not neutral, the insurer would, notwithstanding, be without any means of restitution.

These considerations are sufficient to show that the assured cannot abandon on the capture ; that it is necessary the goods should be defended in the court of the captor ; that the defence of them remains on him ; and that he cannot cast it on the insurer. It is, however, at the same time, to be stated, that if, having made a defence in the *court [*158] of the captor, the assured may still afterwards con-

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trovert the condemnation *at large*, in the suit on the policy, it is obvious such previous defence can be estimated as a mere formality only; that nothing is gained by it to the insurer, but that he is left in the like disadvantageous situation as if he, and not the assured, had to defend the goods in the court of the captor; for although in the suit on the policy, instead of *defending* he will have to *defeat* the title of the assured, still the one case, equally as the other, involves the truth or the falsehood of the *same* facts. The reasoning, therefore, from what has been stated, terminates in this conclusion, that the *right* of the assured to controvert the condemnation, if it does exist, can exist no otherwise than to controvert it, *at large*; that it is his duty to defend the goods against a condemnation in the court of the captor, and that the right and the duty being incompatible, the right must be declared not possible to exist. Lest, however, the reasoning, as it may respect the question, whether the assured can or cannot abandon instantly on the capture, may be considered as inconclusive and unsatisfactory, unless it be shown when he can abandon, it may be requisite still briefly to state, that besides the case of a capture by an enemy, the opposite belligerent party, where the goods are insured as enemy's property, and that of a capture by a pirate, there is another case where the assured may abandon on the capture; that is, in case of a capture by way of reprisal, and which, indeed, is in the nature of a capture by an enemy. Every other capture being necessarily by a friend, in relation to the captured, must be intended to be in order that the goods are to be carried into a port of the captor, for a regular and authorized examination or adjudication, whether they are lawful prize or not, either as being *covertly enemy property*, or if neutral, that the neutrality has become forfeited; and the assured being held to follow the goods and defend them, and the condemnation being conclusive against him, should they be condemned, it results that he can abandon only in the [*159] event of their being restored to him, and the voyage, in consequence of the capture and detention, *broken up*; and if the insurer shall, thereupon, pay the loss,

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then, whatever right or remedy there may be against the captor, will enure to his benefit.

The practice in France has been urged as a precedent ; and Emerigon has been read on the argument, to show what is there received as law on the subject. "The act of the prince is put in the class of casualties ; (*La classe des cas fortuits* ;) and such also is the case, (*Il en est de meme du fait*;) as to the unjust sentence of a magistrate ; and it is of no importance whether the injustice proceeds from the corruption of the judge, or his ignorance ; so that it is then certain, that the insurers shall answer for an unjust condemnation pronounced by the tribunal of the place into which the captured ship shall be carried ; judgments rendered by foreign tribunals being of no weight in France against Frenchmen, as the cause is to be decided anew : whence it follows, that a judgment of condemnation pronounced by an enemy tribunal, is no proof that there has been a concealment of the *real person for whose account* the insurance was made, (*que le veritable pour compte ait ete cache*) nor any title (*un titre*) which the insurer may allege to avoid paying the loss. (Emerigon, c. 12, s. 20.)

The last sentence may be expressed in other words ; "such is our interpretation of the contract between the assured and insurer, as to the right of the assured to controvert a foreign condemnation, the property being insured as neutral." The argument, as contained in what is here cited, is, that an insurance being an indemnity against casualty, and an unjust foreign condemnation being a casualty, an insurance is, therefore, an indemnity against an unjust foreign condemnation ; and the act of the prince being a casualty, the proof of the minor term in the syllogism consists in an assertion, that the act or unjust sentence of a magistrate, is to be classed, equally with the act of a prince, *among [*160] casualties ; whereas, it is difficult to conceive two acts less of the same class or nature, and especially as it respects assured and insurer, than the act of a prince in the exercise of mere sovereignty, arresting goods either for permanent appropriation, or for temporary use, or detention only,

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and the act of the magistrate in function as a judge between captor and captured, condemning the goods as forfeited to the captors. The act of the prince is arbitrary, and can be justified only from necessity, or for reasons of state; and may consist with an admission of a perfect title to the goods in the captured, the person from whom they may be taken; whereas the act of the magistrate is judicial, and, if right, can be only so, as warranted by the law of property, and is in denial of the title of the captured. In case of an arrest by a prince, the right of action of the assured accrues by the arrest; and, therefore, whether it can be justified or not, is never brought into question; but where there is a condemnation by a magistrate, the right of action does not accrue by the condemnation itself; it can only be conceived to accrue by the supposed injustice of it. If the arrest, the act of the prince, is of that class of acts for which the insurer is to answer; then it is immaterial whether it is a foreign or domestic arrest, (if the term "domestic" may, for the sake of brevity, be used and applied to an arrest by a prince, and a condemnation by a magistrate, to distinguish it as having happened in the same, and not in a different nation from that where the assured shall have sued on the policy,) the insurer is equally to answer for the one as the other; but as it relates to a condemnation, the distinction between foreign and domestic is essential; the right, as contended for, being to controvert a foreign condemnation only; and consequently, a domestic condemnation is always to be received as conclusive against the assured. Hence it is evident, that if an unjust sentence of a magistrate is a casualty, for which the insurer is to answer, it cannot be so, as being of the same class with the act of the prince: or that if it should [*161] be admitted to be a casualty, as being of the same class, or *like* an act of the prince, then, as the insurer is equally to answer for the arrest, whether it is domestic or foreign, so ought he, in like manner, to answer for the condemnation, whether it is domestic or foreign; and, therefore, that as far as the argument for the right of the assured to controvert a condemnation, depends on a supposed *similitude*

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between an unjust condemnation by a magistrate, and an arrest by a prince, and so far as it also depends at the same time on the distinction between a foreign and domestic condemnation, and that the right is only to controvert the former but not the latter, it is at variance with, and, consequently, defeats itself.

Emerigon, in farther support of the assertion, "that an unjust condemnation is a casualty for which the insurer is to answer," refers to Roccus, Not. 54. "*Merces captæ a potestate, seu iudice justitiam administrante in illo loco, aut a populo, aut ab alia quacunque persona per vim, absque pretii solutione, tenentur assecuratores solvere æstimationem dominis mercium, facta prius per dominos mercium cessione ad beneficium assecuratorum pro recuperandis illis mercibus, vel pretio ipsorum a capientibus, ut probat Stracc: De Assecurat: Gloss: 20, et sequitur Joan: de Evia in Labyrinth: Commer. naval: lib. 3, c. 14, numb. 27, et melius fundatur ex dictis a Santer: De Assecurat: pars 4, numb. 20, ubi adducit casum de injustitia facta, ab aliquo iudice ex qua merces amittantur vel damnum aliquod sentiant, an comprehendatur sub promissione casus fortuiti, et assecurator teneatur? Adducit Bart: in L: exceptione col: penult: in fin: ff: de fidejusso; ubi illud, quod iudex facta injuste, quoad partes, dicitur casus fortuitus, et pertinet ad emptorem rei, et sic videtur in assecuratione, quod pertinet ad illum qui in se suscepit casum fortuitum.*" I do not possess the authors here referred to by Roccus; but I find the last, Bartolus, referred to by Perezius, a writer on the civil law. Recourse, therefore, must be had to that law to discover the evictions of the things sold, (the condemnation intended by him as *casualties (*casus fortuiti*) and so belonging to the [*162] buyer, (*qui pertinent ad emptorem*), to bear the loss himself, as distinguished from those for which the seller is to answer, in order thereby farther to discover whether in a suit judicially heard and determined between captor and captured, a condemnation of the goods as a prize to the captors, for want of title in the captured, and alleged to be wrongful, is an eviction of the captured, (the assured,) for which

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the insurer is to answer? "Tenetur de evictione venditor—Porro evicta re datur emptori actio adversum venditorem. Est ex empto actio, quæ inest natura contractus—Cessat evictionis præstatio ob culpam emptoris—Culpam committet emptor, neque de evictione agere potest, si, cum posset venditori denunciare, non denunciaverit motam controversiam, utque judicio, adesset et rem defenderet; nam venditori poterat fuisse justa defensionis causa utpote *scienti melius* rei a se venditæ *jus et conditionem*—Ac sic in causa evictionis sententia lata contra emptorem ei sit *regressus* contra venditorem, si *vocatus* ab emptore venditor in judicio comparuerit ad *rei* defensionem eam que susceperit, quia nihil est quod imputetur emptori, qui, ut requiritur, denunciavit venditori motam litem, cui, quod eam defendere non potuerit, imputandum erit." (Perezii Prælect: in lib. 8, cod. tit. 45, de evictioneb.) From these passages, it is evident, that the evictions, intended by Bartolus to be deemed *casualties*, and so the loss by them to be borne by the buyer, must be of a different class or kind from an eviction for the want of title in the seller, he having been vouched to appear and defend his title; (*vocatus ut in judicio compareat ad rei defensionem*;) and the civil law, as to the warranty from the seller to the buyer, in respect to the eviction, or other act whereby the buyer may lose the thing sold, when the loss is to be borne by the buyer, and when the seller is to answer for it, being the same with our own law, it is not necessary, as an answer to the argument, from the supposed analogy between the case of seller and buyer, and the [*163] case of assured and insurer, to add to what "has already been stated in comparing or contrasting a warranty in a grant of lands, with an insurance, the property being insured as neutral; and it only remains to be remarked on Emerigon, considered as an *authority*, that Roccus himself, on whom he relies, does not, by the act of the judge in taking the goods, and for which the insurer is to answer, intend a judicial act or procedure between captor and captured, in a case of taking or capturing goods as lawful prize; the taking, as he describes it, being within the

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territory where the judge has jurisdiction; (*capta judice justitiam administrante in illo loco*,) but a taking as a prize, it is to be supposed, would have been mentioned by him as a taking at sea. That the injustice of the taking consists in its being without paying for the goods; (*absque solutione pretii*,) necessarily importing that the captured, the person from whom they were taken, was entitled to be paid for them, and which again necessarily affirms his title to them; but when the goods are taken from the captured, and adjudged to the captors, the injustice, if any, as it respects the act of the judge, consists in an error in him, in disaffirming any title in the captured; but not in his awarding the goods to the captors, without any recompense to the captured. The official act, therefore, of the magistrate, in taking the goods, intended by Roccus, can be no other than an act in the nature of an impress, and for which the insurer is unquestionably to answer. To suppose an unjust sentence a casualty, so as that the insurer is to answer for it, is altogether fallacious; casualty being applicable only to a fact possible, that it will or will not happen, until it either shall have happened, or, by the intervening happening of some other fact, shall have become impossible ever to happen. In each case, however, it equally ceases to be casual; and becomes certain, in the one that it has happened, and in the other that it cannot ever happen; but such casualty is not applicable to the sentence of a judge on the question, whether it is just or unjust, or to any other mere opinion, whether it is right or wrong, declared
 *on any subject. For although it may be afterwards [*164] demonstrated that the opinion is right, or that it is wrong; yet it never can become either certainly right or certainly wrong, as having before been casual, whether it would be right or whether it would be wrong. It is true that the law has ordained that every judgment, until reversed, shall be taken to be certainly right; if it should be reversed, it is then to be taken as certainly wrong, and the judgment of reversal is to be taken as certainly right. If the judgment of reversal should be reversed, the first judgment being thereby

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affirmed, is again to be taken as certainly right, and the judgment of reversal as certainly wrong; but this legal or artificial certainty is in no manner the same with that certainty existing in nature, and having as its opposite, casualty. Certainty, as opposed to casualty, is to be proved as a fact, to have either physically happened, or become impossible to happen; and is not to be demonstrated as a proposition, either morally right or morally wrong. The opinion whether a sentence is just or unjust, may be ambulatory forever. Thus it is manifest, that the practice in France is erroneous; and there is reason to suppose that it proceeded from a misapprehension of the very authorities cited to prove it to be warranted by law or principle. It, however, having obtained, and being established in fact, in the nature of a custom, or usage, it ought, perhaps, not to be changed there; for both parties being apprized of it, they can make their calculations, as to the risk and premium, accordingly; and in that view no injury will be produced by it; but it certainly can have no influence on the present inquiry, which is, as to the *true interpretation* of the contract, according to *universal* law, independent of any positive local practice whatever.

I will now briefly apply to the case of an insurance, the law, as declared in the case of *Hughes v. Cornelius*, already cited; it being the most ancient case in the books, as to the effect of a foreign condemnation; and the adjudication [*165] which took place in it, having never been questioned, the case is now to be viewed as of the highest authority.

The judges, in that case, not only assume it, that a domestic condemnation is to be received as conclusive; but they suppose that, therefore, a foreign condemnation ought likewise to be so received; they argue the conclusiveness of the latter from the conclusiveness of the former. They express themselves thus, "as we are to take notice of a sentence in the admiralty *here*, so ought we of those *abroad* in other nations, and we must not set them *at large* again." It is true, the question was only as to the *direct*, and not as to the *col-*

lateral effect of a condemnation ; but the reasoning with which the judges close their opinion, that a foreign condemnation is to be conclusive, as to the direct effect of it, namely, " that if the captured is aggrieved, he must apply himself to the king and council, and it being a matter of *government*, he will recommend it to his liege's ambassadors, if he see cause, and if not remedied, he may grant letters of marque and reprisal," will equally apply, that it is to be conclusive, as to the effect of it on an insurance ; and not only contains a sufficient answer to the objections to receiving it as conclusive, as to such effect of it ; but obviously supposes, that as to the several effects of a condemnation in respect to the conclusiveness of it, there is no difference between them.

The objections to receiving a foreign condemnation as conclusive against the assured, if I have rightly understood them, and, indeed, as some of them are expressed by a late English writer, on the law of insurance, (Park, 363,) read on the argument, are, " that the judges of a foreign nation may possibly decide on their own municipal laws or ordinances, contravening, or not forming a part of the law of nations ;" and further, that the judge of a belligerent nation cannot be viewed as standing indifferent between a neutral nation and his own, in deciding on the interfering rights of neutrals and belligerents, as depending on, or to be deduced from the *law of nations*.

*That even the most enlightened and upright [*166] judges may oftentimes, and in a great degree, be under the influence of *national* partiality, can scarcely be denied ; such is human nature ; "*Parum cavet natura.*" But can neutral nations say they are less susceptible of interest or passion, than belligerent nations ? Is not the armed neutrality in Europe, in 1780, to compel the British to acknowledge and observe it as a principle of the law of nations, that free ships make free goods, a proof of directly the reverse ? Can our nation claim us, or can we claim ourselves, to be more free, than the judges of belligerent nations, from national partiality ? If the assured is warranted in surmising a

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partiality in the belligerent judge, is not the insurer equally warranted in surmising it in us; and consequently, will not justice between them as to the question, and according to its just and equal merits, whether the principles of the condemnation, as they relate to the law of nations, are right or wrong, be alike to be suspected as fallible when declared by us, as when declared by the judges of belligerent nations? But a sufficient, and, perhaps, the most proper answer to the whole of the objection, is furnished in substance, by the judges, in the opinion above cited, from the case of *Hughes v. Cornelius*, that if a judge of one nation, in a case of a capture at sea, will assume novel and false principles, as principles of the law of nations, or misapply, or unduly extend, or restrict such as may have been already received and sanctioned, or misinterpret a treaty, or decide wholly on the particular regulations of his own nation, repugnant to, or deviating from the law of nations, or by whatever other erroneous reasonings or means, considered as the principles relative to the law in the case, he shall come to it as a legal conclusion, that the goods captured ought to be condemned as prize, either as being enemy property, or for breach of blockade, or as being contraband of war, or for any other cause whatever, every such condemnation would be a [167] "grievance on the captured, against which his nation is to claim and procure reparation for him. It would be perfectly a *casus fœderis*, a case where the nation, in virtue of the mutual obligation of allegiance and protection, between sovereign and subject, would be held to interfere and remonstrate against the principles of the condemnation; and insist that they be disavowed or renounced, and that reparation be made to the captured; who, instead of seeking for indemnity from an underwriter, through the medium of a court of justice, must seek for it from the foreign nation itself, through the medium of the government or sovereignty of his own nation.

I conclude, with remarking, that possibly, as I have already intimated, an insurer may, by special or express insurance, take on himself the peril of an unjust condemnation;

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and something of that kind has been attempted, by inserting a clause in policies, to the following effect: "Warranted American property, and proof thereof to be made, if required, in New York only;" but whether an insurance in this form, is sufficiently provisional or explicit? Whether it would be deemed to be against a condemnation for *any* cause, or against a condemnation for *some* causes only, and not *others*; and if so, which the causes are, as to be discriminated from each other; and especially, whether the assured may abandon on the capture, or whether he is not bound to follow the goods into the court of the captor, and there defend them; or, in short whether it is not unavoidable, that the whole must be put on the simple footing of a *war premium*, and a *war risk*; so that all understanding, representation, or warranty, that the property is neutral, and that the neutrality is to be preserved, and not forfeited, are to be altogether laid out of the contract between the parties? are questions which I suggest, as probable to arise, but on which it is not necessary that I should express an opinion, in deciding the case at bar; it being a case of general insurance, and where, for the "reasons I have assigned, my opinion is, that [*168] a foreign, equally as a domestic condemnation, is to be received as conclusive against the assured.

LANSING, Ch. J. not having heard the argument in the cause, gave no opinion.

LEWIS, J. absent.

Judgment for the defendants.(a)(b)

(a) See Duer on Insurance, vol. 2, p. 647, 721, 722, 929.

(b) "The doctrine on this subject, in England, has been carried quite as far, to say the least of it, as is consistent with sound policy. Sentences of foreign admiralty courts have been upheld and regarded as conclusive there, even while they were denounced as arbitrary—unjust,—proceeding 'upon worse than Algerine principles,'—'professing to follow the law, but in reality making it a stalking horse for an act of piracy.' See per Kenyon, C. J., *Geyer v. Aguilar*, 7 T. R. 691, 692.

"Some of the more modern cases speak in terms of regret, that the course of adjudication had been so liberal and unguarded. In *Fisher v. Ogle*, 1 Camp. 418, the action was on a policy of insurance upon the *Juno*, represented as an American ship, which had been condemned in a French court of

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vice-admiralty at Martinique. The sentence was in these words:—‘ That it resulted evidently from the papers on board, that the expedition of the said ship Juno, her cargo, and the operations of her captain on the coast of Africa, were for account of the brothers Geddes, merchants of London, who had, to mask the English property of this outfit, borrowed the American flag and passport of the said ship Juno, and taken for their agent and partner, in the expedition, captain Fisher, furnished with a certificate of citizen of the United States.’ It then went on to condemn the vessel and cargo, as ‘ good and valid prize,’ without stating any specific ground of condemnation. Lord Ellenborough said, ‘ we show sufficient respect for French sentences, if we attach credit in our courts to what they distinctly say. It is often painful to go this length, considering the piratical way in which they proceed. But this sentence does not say that the ship was not American; and it is not to be considered evidence of what it does not specifically affirm.’ A verdict was found for the plaintiff, and on motion for a new trial his lordship further said,—‘ I must look to the adjudicative part of the sentence, and there I find nothing stated as to the ship or her cargo not being American. Have you any case in which it was held that the judges must fish for a meaning when a sentence of this kind is produced to them? Here the foreign court seems not to have formed any settled opinion upon the subject, and not to have known or cared on what grounds it proceeded to a condemnation. It is by an overstrained comity, that these sentences are received as conclusive evidence of the facts which they positively aver, and upon which they specifically profess to be founded.’ The other judges were of the same opinion, and the sentence was accordingly held not conclusive. *Id.* 420. In another cause, *Donaldson v. Thompson*, 1 Camp. 429, 432, Lord Ellenborough said, ‘ I am by no means disposed to extend the comity which has been shown to these sentences of foreign admiralty courts. I shall die, like Lord Thurlow, in the belief that they ought never to have been admitted. The doctrine in their favor rests upon an authority in Shower, *Hughes v. Cornelius*, 2 Show. 232, which does not fully support it; and the practice of receiving them often leads to the greatest injustice.’

“ The English doctrine, however, after having been much controverted in this country, has, to a certain extent, received the deliberate sanction of many of our courts. In the Supreme Court of the United States, in Massachusetts, Connecticut, South Carolina, and Louisiana, the sentence of a foreign court of admiralty condemning property for a breach of blockade, or as enemy’s property, is conclusive evidence, as between the insured and underwriter, of the facts upon which it is founded. *Croudson v. Leonard*, 4 Cranch, 434. S. C. 1 Hall’s Amer. Law Journal, 148. *Baxter v. The Marine Ins. Co.* 6 Mass. R. 277. S. C. 7 *id.* 275. *Brown v. The Union Ins. Co.* 4 Day, 179. *Stewart v. Warner*, 1 *id.* 142. Swift’s Ev. 15, 16. *Starkie v. Woodward*, 1 Nott & M’Cord, 329, note. *Groning v. Union Ins. Co.* *id.* 537. *Drayton ada. Wells*, *id.* 409. *Campbell v. Williamson*, 2 Bay, 237. *Cucullu v. Louisiana Ins. Co.* 5 Martin’s Lou. Rep. N. S. 464. *Blanque v. Peytavin*, 4 *id.* 458. *Zeno v. The Louisiana Ins. Co.* 2 Miller’s Lou. Rep. 533.

“ So also in Maryland, formerly; *Gray v. Swan*, 1 Har. & Johns. 142;

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but now by statute such sentence has been reduced to the character of mere *prima facie* evidence. *The Maryland Ins. Co. and Phoenix Fire Ins. Co. v. Bathurst*, 5 Gill & Johns. 159.

"And in Pennsylvania the same doctrine prevailed for a time as in England; *Dempsey v. Ins. Co. of Pennsylvania*, 1 Binn. 299, note; see *Brown v. Ins. Co. of Pennsylvania*, 4 Yeates, 119; but the legislature there, likewise, have provided, that no sentence of a foreign prize court shall be conclusive of any facts, save the actings and doings of the court. See Starkie's Ev. 239, note 1.

"In New York, the rule is now well established, that although the sentence of condemnation by a foreign court of admiralty, is conclusive to change the property, yet it is only *prima facie* evidence of the facts upon which it purports to be founded; and in a collateral action, such evidence may be rebutted by showing that no such facts existed. *Vandenheuvel v. The United Ins. Co.* 2 Johns. Cas. 451. S. C. 2 Caines's Cas. in Err. 217. *New York Firemen Ins. Co. v. De Wolf*, 2 Cowen, 56. *Ocean Ins. Co. v. Francis*, 2 Wend. 64. *Radcliffe v. United Ins. Co.* 9 Johns. R. 277. *Johnston v. Ludlow*, 2 Johns. Cas. 481. *Laing v. United Ins. Co.* id. 487.

"The doctrine in Virginia is the same as in New York. *Bourke v. Granberry*, 1 Gilmer, 16.

"The sentence of a foreign court of admiralty is conclusive only as to what is positively affirmed in it, and not of that which can merely be gathered from it by inference. *Fisher v. Ogle*, 1 Camp. 418, stated *supra*. See also, *Hornseyer v. Lushington*, 3 id. 88, 89. Roscoe on Ev. 103. *Dalglish v. Hedgson*, 7 Bing. 495, S. P.

"And the court must look to the judicative part of it; for it will not be evidence of what is merely stated in the consideration part. *Christie v. Secretan*, 8 T. R. 192. 2 Ev. Poth. 355. See *Maryland and Phoenix Ins. Co. v. Bathurst*, 5 Gill & Johns. 159. *Robinson et al. v. Jones*, 8 Mass. R. 536.

"Like the judgment of a court of common law, it is, in general, conclusive as to its own correctness and the facts necessary to uphold it; but not as to facts without which it may have been rightly pronounced. *Malay v. Shattuck*, 3 Cranch, 458, 488.

"In New York, also, the Court of Errors have held, that a condemnation as 'lawful prize,' afforded no *judicial inference* of the vessel being enemy's property, as there may be other just causes of condemnation. *Goix v. Low*, 2 Johns. Cas. 480. And the reporter in a note to this case says—'From the cases of *Pollard v. Bell*, 8 Term Rep. 444, *Bird v. Appleton*, id. 563, and *Fisher v. Ogle*, 1 Camp. 418, it seems now to be the opinion of the English courts, that where the sentence of the foreign court of admiralty condemns merely as 'good and lawful prize,' without adverting to the question whether it is neutral or enemy's property, such sentence is not conclusive.'" Cowen & Hill's Notes to 1 Phill. Ev. 861, 862, 863; id. 860, *et seq.* where the subject of sentences in courts of admiralty and foreign courts is fully considered; see *supra*, 144, note (b).

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MURRAY AND MURRAY *against* THE UNITED INSURANCE COMPANY.

If a vessel be described in a policy of insurance as an American ship, it is a warranty that she is American.

Where an American vessel was transferred to A. in trust to secure a debt due to B. who was a British subject, it was held, that B. being the *cestuy que trust* of the profits of the vessel, and a subject of one of the belligerents, the vessel ceased to be American ; and the fact not being communicated to the insurers, the policy was void ; and the insured entitled to a return of premium only.

THIS was an action on a policy of insurance, on the "American brig, called the Mary," from New York to a port in Jamaica. The cause was tried, at the last March circuit in New York, before Mr. Justice *Radcliff*, when the jury found a special verdict. The material facts are the following : John Bazing, a citizen of the United States, was sole owner of the brig, which was duly registered as an American vessel. On the 28th April, 1798, Bazing conveyed the brig, by a regular bill of sale, to John Murray, (one of the plaintiffs,) and William Hart, both citizens of the United States, who thereupon obtained an American register, in their own names. The bill of sale, although absolute in terms, was executed in trust, for the purposes set forth in an agreement executed, the same day, between the parties ; and which agreement stated that Nathaniel Bayley, by his agents, Murray and Hart, had sued Bazing, who not being able to find bail, had transferred the brig to Murray and Hart ; and

Murray and Hart obligated themselves to reconvey [*169] the brig to Bazing, in case he put in *good special bail, in ten days, and if not, it was agreed, that the brig should proceed on her voyage to Jamaica, in which case the suit was to be discontinued, and Bazing to pay the costs. If the brig proceeded on her voyage, it was agreed, that Murray and Hart were to cause her to be insured, at the expense of Bazing ; and the earning and freight were to be applied to satisfy the debt due from Bazing to Bayley ; and

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if the vessel should be lost, the sum insured was to be applied in like manner; and if the vessel returned, and the demand of Bayley was not satisfied, then Murray and Hart were to sell the vessel at auction, and apply the proceeds to satisfy the debt; and the overplus (if any) was to be returned to Bazing. It was further agreed, that Bazing might, if he preferred, employ the vessel for four months from that time, in the coasting trade, and enjoy the freight and earning, and pay the charges; if the debt was not satisfied in that time, then Murray and Hart were to sell the vessel, as above mentioned.

Bayley was a British subject residing in Jamaica. The policy was signed on the 15th of May, 1798. The plaintiffs did not disclose, or communicate the above agreement to the defendants; and it was admitted, that if they had disclosed it, there would have been no additional premium, under an idea, that the bill of sale did not vest any interest in Bayley. The brig, while on her voyage, was, on the 24th of May, 1798, captured by a French privateer, and carried into Cape François, and condemned, as good prize, on account of double and colored papers, proving the brig on the one hand to be the property of William Hart, and on the other, the property of John Bazing.

B. Livingston and Burr, for the plaintiffs.

Hamilton, Harison and Troup, for the defendants.

*RADCLIFF, J. This vessel was insured as the [*170] American brig Mary. This has already been considered as equivalent to a representation of neutral property. It is stronger than a representation, for being contained in the policy itself, it amounts to an implied warranty of that fact.(a) Considering it either as a representation, or an implied warranty,(b) the plaintiffs, according to the cases al-

(a) See *Goix v. Low*, *supra*, vol. 1, p. 341, and n. (c.)

(b) Mr. Marshall, (1 Marshall, 450,) defines a representation, as "a collateral statement, either by writing, not inserted in the policy, or by parol, of such facts or circumstances relative to the proposed adventure, as are necessary to be communicated to the underwriters, to enable them to form a just estimate of the risks." Mr. Duer, in commenting upon this definition, ob-

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ready decided, are precluded from a recovery, by the operation of the sentence in the French court of prizes, which

serves, that it "has been generally followed, and in many judicial opinions, its accuracy seems to be fully admitted. It is, however, liable to many and grave objections.

"It is not essential to a representation that it should be made by parol, or by a writing *not inserted* in the policy; it may be contained in the policy itself. It is true, that by the English law, and our own, every affirmation of a fact contained in the policy, in whatever terms expressed, is construed as a warranty; [in the case of *De Hahn v. Hartley*, 1 T. R. 343, these words, 'sailed from Liverpool, with 14 six pounders, swivels, small arms, and fifty hands or upwards, copper sheathed,' written in the margin of the policy, were held to be a warranty. In *Kenyon v. Berthon*, the following words were written transversely in the margin of the policy: 'in port on the 20th of July, 1776.' Lord Mansfield was clear that they were a warranty, and as the vessel was proved to have sailed on the 18th of July, that the underwriter was not liable, although the difference of two days was not material to the risk. Doug 12, No. 4. See also *Bean v. Stupart*, Doug. 11. If the vessel is described in the policy as an American, British, Swedish ship, &c., it is a warranty of national character. *Goix v. Low*, 1 Johns. Cases, 341; *Murray v. United Ins. Co.* 2 Johns. Cases, 168; *Barker v. Phen. Ins. Co.* 8 Johns. R. 237; *Francis v. Ocean Ins. Co.* 6 Cowen, 404;] but when the statement relates, not to facts, but to the information, expectation or belief of the party, it is plain that it cannot be thus construed, and it is equally clear that when the parties declare that the statement, although positive in its terms, shall be construed as a representation, and not as a warranty, the intention so declared, must supersede the general rule. [*Hodgson v. Richardson*, 1 Black. 463. *Reid v. Harvey*, 4 Dow. 97. *Thomson v. Buchanan*, 4 Brown's P. C., Tomlyn's ed. 484. *Stewart v. Morrison*, Millar on Ins. 54. *Rice v. N. Eng. Ins. Co.* 4 Pick. 414. *Baxter v. N. Eng. Ins. Co.* 3 Mass. R. 96. *Andrews v. Essex Ins. Co.* 3 Mason, 61. *Lothian v. Henderson*, 3 B. & P. 499. 1 Phillips, 269. 1 Marshall, 315. 1 Emerigon, 182.] To illustrate this: If it be stated in the policy that the vessel to which the insurance relates, is provided with 10 guns and 20 men, this is a warranty; and if she have one gun, or one man less than the stipulated number, the policy is void; but if the statement be, that '*according to the last advices*, the vessel will be furnished with the same armament,' this is not a warranty of the fact, but a mere assertion that such advices had been received, and if this assertion be true, and the case is otherwise exempt from fraud, the policy is valid, even when the information proves to be wholly erroneous. If to the positive statement, these or equivalent words are added, '*It is, however, understood, that this statement is not to be construed as a warranty, but as a representation merely*,' its literal fulfilment is no longer requisite, and unless the variation from its terms be such as plainly to enhance the risks, the insurer continues liable." 2 Duer on Insurance, 644-646.

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among other causes, proceeds on the ground that the property was English. But I also think the plaintiffs are precluded on the merits.

1. A representation or warranty of neutrality, requires the property to be *wholly* neutral. If one of the belligerents had an interest, whether partial or entire, the risk was thereby increased, and the warranty not complied with. In the present case, Bazing, the original owner, made a bill of sale on the 20th of April, to the plaintiffs, in trust for one Bayley, who was a British subject. The insurance was made on the 15th of May thereafter. By an article executed at the same time with the bill of sale, it was agreed to reconvey the brig to Bazing, within a limited time, if he should enter good bail in a suit then depending against him, in favor of Bayley; or if the money due to Bayley should be paid, either by the earnings of the vessel or otherwise; and it was particularly agreed, that the freight of the brig, on the voyage in question, should be applied to the debt due to Bayley; and if the freight should prove insufficient, the vessel was to be sold for the payment of the debt, and the surplus money only returned to Bazing. By virtue of the bill of sale and this agreement, Bayley had an interest in the vessel, and in her freight; and he might finally sell and dispose of her as he saw fit, for the payment of his debt. Whether this interest was, according to the distinction of our law, a *legal* or *equitable* *interest is not material to the [*171] question. That distinction, I believe, is not known in any other country, except the one from which we derive our jurisprudence. It is peculiar to England and the United States. It is sufficient, therefore, that Bayley had a vested interest, which he might enforce in some of the courts of any country. His interest being such, and he being one of the belligerents, the property was not *wholly* neutral, and the implied warranty is, therefore, not supported.

2. It appears by the verdict that the circumstances relative to the interest of Bayley were not disclosed to the underwriters. If they were material to the risk, which I think they undoubtedly were, they ought to have been disclosed;

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and the defendants would then have had an opportunity to act as they saw fit.(a) It is true, that it is also found that the defendant afterwards admitted, that had they known the agreement, its contents would not have induced them to demand a higher premium, under an idea, that it did not vest any interest in Bayley. But if the light in which I have viewed it be just, this idea was incorrect, and founded in mistake, and, therefore, cannot affect the merits of the question.

Although the terms of the agreement were not fully known to the French admiralty ; yet it appeared by a letter from William Hart to Bayley, that the vessel was conveyed by a bill of sale in trust, as above mentioned, and that the court

(a) See note (a) to *Seton v. Low*, *supra*, vol. 1, p. 8 ; 1 Phillips on Ins. 213, *et seq.* In *McLanahan v. The Universal Ins. Co.* 1 Peters, 185, Mr. Justice Story observes : " The contract of insurance has been said to be a contract *uberrimæ fidei*, and the principles which govern it are those of an enlightened moral policy. The underwriter must be presumed to act upon a belief that the party procuring insurance, is not at the time in possession of any facts material to the risk, which he does not disclose." Mr. Duer in treating of concealment, (Duer on Ins. vol. 2, p. 380, § 2,) remarks that " Marine insurance is, emphatically, a contract—to borrow an expressive phrase from the Roman law—*uberrimæ fidei*, of the most abounding good faith. It abhors deceit, dissimulation, evasion. It condemns alike, the suppression of truth, and the assertion of falsehood. It seeks to place the parties, as far as practicable, on the ground of an entire equality, and, therefore, exacts from both a frank and unreserved candor, an open and lucid integrity. The general rules are, that each is bound to communicate to the other, all facts within his personal knowledge, that tend to show the true character and value of the risks that are meant to be covered, and that each, in his own communications to the other, is bound to state the exact and the whole truth, in relation to the facts that he represents, or upon inquiry, discloses. *Carter v. Boehm*, 3 Burr. 1905. *Seaman v. Fonereau*, 2 Strange, 1183. *Oliver v. Greene*, 3 Mass. R. 133. *Kohne v. N. A. Ins. Co.* 1 Wash. C. C. R. 156. *Vale v. Phoenix Ins. Co.* 1 Wash. C. C. R. 283. *McLanahan v. Univer. Ins. Co.* 1 Peters, 185. Park, 8th ed. 403. 3 Kent's Comm. 283. Grotius de Jur. Bell. Lib. 2, ch. 12, § 23. Bynkershoek Quæst. Jur. Pri. Lib. 4, ch. 25, § 6. Pardessus, tom. 3, p. 330. Boulay Paty, tom. 3, p. 500. 3 Benecke, ch. 10, p. 292. 1 Emerig. ch. 1, § 3, p. 18, 19. Pothier, n. 91." Consult also Duer on Ins. vol. 2, p. 503, 506, where the ordinances of Hamburgh, Stockholm, Rotterdam, Amsterdam, Bilbao, and Prussia, and other proofs and illustrations are collected.

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went on this ground, among others, in condemning the vessel, and I think the evidence was sufficient to justify the sentence. For these reasons, I am of opinion, that the plaintiffs cannot recover; that the policy was void *ab initio*, and the risk never commenced. But as no *actual fraud* has appeared, the plaintiffs are entitled to a return of the premium; and for this they ought to have judgment. The right to a return of the premium has been already decided in this court, under similar circumstances; and the [*172] reasons in support of that decision need not be repeated.

KENT, J. Two questions arise in this cause:

1. Was the vessel warranted American? If so;
2. Do not the condemnation at Cape François, and the fact that Bayley, the *cestuy que trust* of the profits of the vessel, was a British subject, furnish sufficient evidence of a breach of the warranty.

1. The first question has already been decided in this court, in the case of *Goir v. Low*, (1 Johns. Cas. 141.) It was there determined, that if a vessel be described as an American vessel, it amounts to a warranty that she is American:

2. As to the second question, it is sufficient to refer to the bill of sale and agreement, without taking notice of the sentence at Cape François, which is destitute of precision, and does not state with clearness the result of the deductions of the court. It appears that Murray and Hart took a bill of sale of the vessel, as trustees for Bayley, and that he was, in equity, the owner, or *cestuy que trust*, or entitled to the profits of the vessel during the voyage. This was sufficient under our own law to destroy her privilege as an American vessel. The act of Congress declares, that no vessel shall continue to enjoy such privilege any longer than she shall continue to be wholly owned by American citizens; nor shall an American register be obtained, without affidavit, that no foreigner is either directly or indirectly, by way of trust, confidence, or otherwise, interested in the vessel, or in the profits and issues thereof. The section in this act, prescribing the form

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of the oath, accordingly explains and illustrates the meaning of the other part, that the vessel must be wholly owned by American citizens. This brig, therefore, sailed without being entitled to an American register, within the true intent and meaning of the act; and one of the enemies of [*173] France, being a *cestuy que* *trust* of her profits, she was not, in reference to the powers at war, to be considered a neutral vessel entitled to the privileges of neutrality. It is easy to perceive, that if such arrangement was to be permitted, foreigners resident abroad could trade with all the immunities of Americans, contrary to the policy of our statute, and contrary to the right of maritime capture, as it respected the belligerent powers.

I am of opinion, therefore, that the interest of Bayley in the profits of the vessel, is evidence of a breach of the warranty, the same not being wholly true; and consequently, that the plaintiffs are not entitled to recover any thing, except the premium, to which they are of course entitled, there being no actual fraud in the case.(a) (1 Johns. Cas. 310.)

LANSING, Ch. J. was of the same opinion.

LEWIS, J. was absent.

BENSON, J. referred to the opinion delivered by him, in the case of *Vandenhoevel v. The United Insurance Company*, as to the effect of foreign sentences, as conclusive in this case.

Judgment for the plaintiffs, for a return of premium only.(b)

(a) As to return of premium see *supra*, vol. 1, p. 313, n. (a) to *Delavigne v. The United Ins Co.*

(b) [Old note.] Several other similar causes were also decided this term. In *Haikin v. The New York Insurance Company*, the vessel was captured by the British, and condemned as lawful prize; no reason being assigned for the condemnation in the sentence. On the principles decided in *Goix v. Low*, and *Vandenhoevel v. The United Insurance Company*, the court (LANSING, Ch. J. and LEWIS, J. being absent) considered the word American, as amounting to a warranty, and the sentence of the admiralty court, though general, as conclusive. In *Vandenhoevel v. Church*, there was no warranty contained in the policy; but in the written instructions to the broker, the ship was represented to be American, and the property of a citizen of the United

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'LAING *against* THE UNITED INSURANCE COMP- [*174]
NY.—The Same *against* The Same.—The Same
***against* The Same.(a)**

Where a policy of insurance contained the following clause: ' It is also agreed, that the property be warranted by the assured, free from any charge, damage, or loss, which may arise in consequence of seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war," and the vessel and cargo having been captured, part of the cargo, consisting of block tin and tin plates, was condemned as contraband of war; it was held that the insured were not entitled to recover for any loss, in consequence of the capture; the sentence of the court of admiralty being conclusive evidence that the tin was contraband of war.

THESE were actions on three different policies of insurance: one on the *vessel*, another on the *cargo*, and the other on the *freight*. The first cause was tried at the December circuit, before Mr. Justice *Radcliff*, and a verdict was found for the plaintiff for a total loss, subject to the opinion of the court on a case, the principal facts of which apply equally to all the causes.

The policies were in the usual form, with this additional clause: " It is also agreed, that the property be warranted by the assured, free from any charge, damage or loss, which may arise in consequence of seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war." The voyage insured was from New York to La Vera Cruz, with the leave to touch at the Havana. The plaintiff was owner of the vessel, and a naturalized citizen of the United States. The vessel was cap-

States, residing in New York. The vessel was condemned as the property of Spanish subjects, enemies of Great Britain; and the court considered the representation as equivalent to a warranty; and the sentence of the admiralty court as conclusive evidence of the breach of warranty. But by the reversal of the judgment, in the case of *Vandenheuvel v. The United Insurance Company*, in the Court of Errors, foreign sentences are now no longer held to be conclusive.

(a) Reversed in error, *infra*, p. 487. See also *Johnson v. Ludlow*, *infra*, 481; 1 Phillips on Ins. 712.

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tured on her voyage by a British ship of war, and carried into New Providence; and on the 2d day of August, 1799, the vessel and that part of the cargo belonging to the plaintiff, were acquitted; but *six blocks of tin, and seventy-eight boxes of tin plates*, being part of the cargo, and belonging to other shippers, were condemned by the court of vice-admiralty, as contraband of war. After notice of the capture, and before notice of the acquittal, the vessel and cargo, belonging to the plaintiff, together with the freight, were, on the 12th of August, 1799, abandoned to the defendant. Soon after the acquittal, the vessel returned to New York; but most of the cargo belonging to the plaintiff, was sold by him, at New Providence, to defray the expenses of the prosecution, and the remainder was brought back to New York. The plaintiff, on the 15th of June, and previous to the date of the policy on the freight, chartered the vessel to Robert Weir and James Johnson, for the voyage, for 3600 dollars, payable on the return of the vessel, and discharge of her cargo.

It was admitted in the case, that tin in blocks is a necessary ingredient in the manufacture of brass cannon; and that tin plates are used in the manufacture of camp kettles, canteens, and canister shot, and that they are sometimes used in lining the magazines and cabouses of vessels of war. That block tin and tin plates are used in various other manufactures, not applicable to military or naval purposes, and are also applied to various domestic uses; that the number of purposes, not military or naval, greatly exceeds the number of those of a military and naval kind, for which they are used.

It was agreed, that either party might turn the case into a special verdict.

Burr, for the plaintiff.

Hamilton and Troup, for the defendants.

RADCLIFF, J. I think it unnecessary to decide whether tin in blocks, or in any other form, is an article contraband of war; or to consider the merits of the foreign sentence. If the opinion be correct, that the insured, in every case, under-

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takes to maintain the truth of his warranty, it is decisive, as between him and the "insurer, in the present case. Such a construction is consistent with the terms of the warranty in the present policy. The insurers are declared to be free from "any loss which may arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade, or of any trade in articles contraband of war." The construction of this warranty I consider to be the same, as the just interpretation of the policy on the face of it, and liable to the same result. There must be a judgment of nonsuit in all the causes. [*176]

KENT, J. The great point on which these several causes turn, is simply, whether the plaintiff has or has not broken his warranty, that the property should be free from loss or charge arising from seizure on account of any trade in articles contraband of war. If he has not, then, the seizure and consequent notice of abandonment, would entitle him to recover for a total loss. To determine this fact, in respect to the warranty, we are brought to a consideration of the sentence of condemnation. Are we to regard the sentence as conclusive evidence of the allegation, that the tin was an article contraband of war? If not, and the merits of the judgment are to be overruled, is tin an article contraband of war, as between us and Great Britain?

Upon the first question my opinion is, that the sentence being direct, and upon the very point of the warranty, is conclusive evidence of a breach of it. The reasons for this opinion have already been given in the case of *Vandenheuvel v. The United Insurance Company*; and I am accordingly of opinion, that judgment must be for the defendant, upon the terms stated in the case.(a)

BENTON, J. was of the same opinion.

LEWIS, J. was absent.

*LANSING, Ch. J. Three questions are presented [*177] for the examination of the court; but the first,

(a) See *Vandenheuvel v. The United Ins. Co. supra*, p. 127, and note (b) p. 144, and note (b) p. 168.

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whether tin in blocks, or tin in plates, are articles contraband of war, is, in the light in which I consider the subject, and the question arising on the warranty, such as renders a decision on the others unnecessary.

If the decision of the British court of vice-admiralty, in pronouncing these articles *contraband of war*, is correct, or if they are considered as not contraband, and yet the parties are concluded by that decision, it might impose it on the court to consider what influence the other points raised in the cause ought to have on our final determination.

As the reasons of the condemnation appear, I consider them as proper objects for the examination of this court; and this is strictly conformable to the principles laid down in the cases arising in the British courts, and which, I take it, there is no adjudication of our courts to restrain, except the case of *Ludlow v. Dale*, (1 Johns. Cas. 16.) That case was determined on the point, that the sentences of foreign courts were conclusive, after a *full argument* on the other points presented in the cause, in which the counsel refrained from laying any great stress on it, their attention being principally directed to the other points in the cause.

It is certain that the British courts have distinguished between cases presenting a right of condemnation, as deducible from the law of nations, and such as, dictated by peculiar views or situations, are arrogated by the belligerent powers to promote their own interest, regardless of the influence that law ought to have on their conduct.

On this ground, they have confined themselves to resisting the effect of local ordinances, detracting from the rights of neutrals; but whether the injury to those rights originated in positive ordinances, or were produced by [*178] *gradually diverging from the line which, consistent with the general maritime law, ought to regulate their conduct, I consider as very immaterial, and cannot, certainly, vary the principles by which it is to be tested.

Neutral powers are interested in repelling every attempt to impair their rights, and in protecting the lawful commerce of their citizens; and, as one of the means of resisting ag-

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gression and defending that commerce, in withholding their sanction from every unjust attempt to invade it.

I take it, that there is no essential difference between cases of condemnation produced by arbitrary ordinances, and arbitrary and unfounded extensions of principles, without the aid of ordinances ; that both ought to be considered as equally open to examination ; and that we ought not, nor does justice or general convenience require us, to close the door, so as to exclude such examinations.

In the case of *Goix v. Low*, (1 Johns. Cas. 341,) I entered into a particular examination of all the cases adduced to prove the conclusiveness of foreign sentences ; and I stated the rules deduced from them, as laid down by Lord Mansfield, as collected from all preceding cases ; and my opinion respecting them, as a general result from the whole.

Tin, in the different shapes in which it is described in this case, is susceptible of application to a great variety of uses ; and, with few exceptions, is applied to purposes which have no connection with military or naval equipments. The domestic and ordinary purposes to which it is applied, create a consumption of that article, in a much greater and more extensive degree than any warlike purposes.

If its destination might be permitted to mingle in the circumstances justifying the condemnation, and it had been intercepted on its way to a port in which hostile "preparations in navy yards, or founderies of cannon [*179] were carried on, these considerations would in this question, operate against the condemnation ; for it is expressly admitted, that there was no establishment of the latter description in the West Indies, and the case is silent as to the former : it cannot, therefore, be necessary to trace the reasoning on this subject.

If the extension given to the principle respecting naval and military stores, as laid down in this sentence, is correct, it is difficult to determine what modification of wood or metals can exempt them from so comprehensive a construction. It appears to be palpably misapplied ; it is an arbitrary and un-

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founded extension; as such it ought to be disregarded, as affecting the rights of neutrals, and which they are not bound to sanction in their judicial proceedings, as derogatory from those rights.

The policy contains a warranty, that the subject insured shall be free from any charge, damage, or loss, which may arise in consequence of any seizure or detention, *for or on account of any illicit or prohibited trade, or trade in articles contraband of war.*

This warranty is precisely to the point on which the loss happened. The condemnation was expressly on the ground that the articles condemned were *contraband of war*. But the insured had stipulated by their warranty, that all seizures *for or on account of any illicit or prohibited trade*, should not affect the insurers.(b)

On this point, respecting the warranty, I therefore concur with the general result, deduced by the rest of the court from the case, that the defendants ought to have judgment.

Judgment for the defendants.(c)

[*180] *VOS AND GRAVES *against* THE UNITED INSURANCE COMPANY.(a)

A vessel was insured from New York to Amsterdam, and at the time of her sailing from New York, it was not known that the Texel was blockaded by the British. The master, during the voyage, put into Cruzhaven, and was there informed that Amsterdam was blockaded; but supposing that he should not be captured for the *first* attempt, sailed from Cruzhaven with the intention of entering Amsterdam, knowing it to be blockaded; and on his way the vessel was captured by a British cruiser and condemned; it was held, that sailing from Cruzhaven with the knowledge of the blockade, and with the intention to go to Amsterdam, was, *prima facie*, evidence

(b) See note to *Delavigne v. The United Ins. Co. supra*, vol. 1, p. 313.

(c) This judgment was afterwards, (1802,) reversed in the Court of Errors. See *infra*, p. 487.

(a) Reversed in error; see 1 Caines' Cas. in Err. vii. *infra*, p. 469.

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of an attempt to enter a blockaded port ; and that such an attempt was a breach of the warranty of neutrality, and the insurers, therefore, not liable on the policy.

THIS was an action on a policy of insurance on goods, on board of the American brig, the Columbia, from New York to Amsterdam, dated the 21st of June, 1798, at a premium of $17\frac{1}{4}$ per cent.

The cause was tried on the 26th of March, 1800, at the New York circuit ; and a verdict was taken for the plaintiffs, subject to the opinion of the court, on the following case, which it was agreed might be changed into a special verdict, by either party.

The property was warranted American. It was also warranted that no loss should arise to the defendants by capture, seizure, or detention in the port of Amsterdam, the Texel, or the Vlie.

The assured, for an additional premium of two and a half per cent. had liberty, by a memorandum at the foot of the policy, to touch and trade at Hamburgh. This permission was granted in consequence of the following letters from the plaintiffs to the defendants.

“ *New York, June 25th, 1798.*

“ The cargo of the brig Columbia, Benjamin Weeks, master, being insured at the New York Insurance Company, at and from hence to Amsterdam, on the 14th instant, and the accounts daily arriving rendering motives of *precaution* extremely necessary ; we, therefore, propose to order the vessel to touch at Hamburgh for orders, (which may be done without delay, as she is to go north about,) provided you will permit it in the policy, without any additional premium ; and should our friends advise that it would be *dangerous* to proceed to *Amsterdam, in that case the [*181] risk should end at Hamburgh.”

At the foot of this letter the president of the company made this memorandum : “ Two and a half per cent. additional premium for leave to call at Hamburgh, to be returned in case the risk shall end there.”

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"New York, June 27th, 1798.

"On being informed that the Texel was blockaded by the English, and a ship from Philadelphia, bound to Amsterdam, had actually been sent to Yarmouth, we applied to you yesterday to obtain leave for the brig Columbia to touch at Hamburg for orders. From this circumstance we conceived it highly interesting to the office to grant the permission, without the charge of an additional premium. At any rate, we would rather have the vessel proceed on, as the policy now stands, than to augment the premium; for the circumstance of the blockade was unknown to us at the date the insurance was effected; and it is probable, it may be withdrawn by the time the vessel reaches Amsterdam."

The Columbia was an American brig, and the property insured was also American.

The Columbia sailed from New York about the 1st of July, 1798, on the voyage insured. She arrived at Cruxhaven, on her way to Hamburg, in August following. Three or four days thereafter, she sailed from Cruxhaven for Amsterdam. The day she left Cruxhaven, she was captured by a British sloop of war, called the Ranger, and carried into Yarmouth.

The mate of the brig testified, "That it was generally understood among the Americans, at Cruxhaven, at the time the Columbia sailed from thence, that Amsterdam was considered as a blockaded port; and it was so understood by [*182] himself and the captain of the brig; that the Ranger, upon falling in with the said brig, immediately seized her, as being bound to a blockaded port; and also on the pretext of her having Dutch property on board.

"That it was also generally understood by the Americans at Cruxhaven, at the time of the brig's leaving it, and it was so understood by him and the captain, that it was the practice of British cruisers to stop vessels bound to Amsterdam, and send them back without seizing them; and only to seize, in case of a second attempt to enter Amsterdam, and under this idea the captain sailed for Amsterdam."

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The brig and cargo were libelled in the high court of admiralty in England, and both condemned for the captain's attempting to go to a blockaded port.

Sir William Scott, judge of the court, pronounced the following sentence : (a)

" There is pretty clear proof of neutral property in this case, both of the ship and cargo ; but the vessel was taken attempting to break a blockade. It is unnecessary for me to observe, that there is no rule of the law of nations more established than this, that the breach of a blockade subjects the property so employed to confiscation. Among all the contradictory positions that have been advanced on the law of nations, this principle has never been disputed. It is to be found in all books of law, and in all treaties. Every man knows it. The subjects of all states know it, as it is universally acknowledged by all governments which possess any degree of civil knowledge.

" This vessel comes from America, and, as it appears, with innocent intentions on the part of the American owners, for it was not known at that time in America, that Amsterdam was in a state of investment ; and therefore there is no proof immediately affecting the owners. But a person may be penally affected by the misconduct *of his [*183] agents, as well as by his own acts ; and if he delegates general powers to others, and they misuse their trust, his remedy must be against them. The master was, by his instructions, to go north about to Cruxhaven. This precaution is, perhaps, liable to some unfavorable interpretation. The counsel for the claimant have endeavored to interpret it to their advantage, but at the best it can be but a matter of indifference. When he arrived at Cruxhaven, he was to go immediately to Hamburgh, and to put himself under the direction of Messrs. Boue and Company. They therefore were to have the entire dominion over the ship and cargo.

(a) See 1 Rob. Adm. Rep. 154. The case was heard in the high court of appeals the 12th August, 1801, and the sentence of the court below was affirmed.

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It appears, however, they corresponded with persons at Amsterdam, to whom farther confidential instructions had been given by the owners; and these orders are found in a letter from Messrs. Vos and Graves, of New York, to Boue and Company, informing them, that the Columbia was intended for Amsterdam, consigned to the house of Crommelin, to whom Boue and Company are directed to send the vessel, 'if the winds should continue unsteady, and keep the English cruisers off the Dutch coast.' If not, they were to unload the cargo, and forward it, by the interior navigation, to Amsterdam. Boue and Company accordingly directed the master 'to proceed to Amsterdam, if the winds should be such as to keep the English at a distance.' There is also a letter from the master to Boue from Cruzhaven, in which he says, 'Amsterdam is blockaded.'

"We have this fact, then, that when the master sailed from Cruzhaven, the blockade was perfectly well known both to him and the consignees; but their design was to seize the opportunity of entering whilst the winds kept the blockading force at a distance. Under these circumstances, I have no hesitation in saying, that the blockade was broken. [*184] The blockade was to be *considered as legally existing, although the winds did occasionally blow off the blockading squadron. It was an accidental change which must take place in every blockade, but the blockade is not therefore suspended. The contrary is laid down in all books of authority; and the law considers an attempt to take advantage of such an accidental removal, as an attempt to break the blockade, and as a mere fraud.

But it has been said, that by the American treaty there must be a previous warning. Certainly, where the vessels sail without a knowledge of the blockade, a notice is necessary; but if you can affect them with the knowledge of that fact, a warning then becomes an idle ceremony, of no use, and therefore not to be required. The master, the consignees, and all persons intrusted with the management of the vessel, appear to have been sufficiently informed of this

blockade, and therefore they are not in the situation which the treaty supposes.

"It is said also, that the vessel had not arrived; that the offence was not actually committed, but rested in intention only. On this point I am clearly of opinion, that the sailing with an intention of evading the blockade of the Texel, was beginning to execute that intention, and is an *overt act* constituting the offence. From that moment the blockade is fraudulently invaded. I must, therefore, on full conviction, pronounce that a breach of blockade has been committed in this case; that the act of the master will affect the owner to the extent of the whole of his property concerned in the transaction. The ship and cargo belong, in this case, to the same individuals, and therefore they must be both involved in the sentence of condemnation."

It was admitted, that at the date of the policy, to wit, on the 21st June, 1798, neither party knew of the Texel's being blockaded.

"On receiving the news of the capture, the assured duly abandoned to the defendants. [*185]

RADCLIFF, J. This was the case of a policy on goods on board of the American brig, the *Columbia*, from New York to Amsterdam, with liberty to touch and trade at *Hamburg*. The property was warranted to be American, or neutral. The vessel sailed from New York, and arrived at *Cruzhaven*, on her way to *Hamburg*, and soon after sailed from thence for Amsterdam. She was captured, the day she sailed, from *Cruzhaven*, by a British sloop of war, carried to *Yarmouth*, and libelled in the English court of admiralty, and, with her cargo, was condemned for attempting to enter a blockaded port.

On the 21st of June, 1798, the date of the policy, neither party knew of the investment of Amsterdam; and this excludes the idea, that by any special agreement or understanding, the insurance could have been meant to extend to any peril, for breach of the particular blockade in question, if any existed.

1. It is a settled rule, that the insured, in order to comply

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with his warranty, must not only maintain the property to be neutral, but so conduct himself, towards the belligerent parties, as not to forfeit his neutrality. He must pursue the conduct, and preserve the character, of a neutral. This being the import of the warranty, and the condemnation being founded on a breach of neutrality, it operates to preclude the plaintiffs, on the principles adopted with regard to the effect of foreign sentences, in the case of *Vandenhoeve v. The United Insurance Company*, from any recovery on the policy.^(a)

2. In the present case, the plaintiffs, before the vessel sailed from New York, to wit, on the 27th of June, in consideration of law, had notice of the blockade. This appears by their letter to the defendant of that date. *Al though the information was not then certain, it was sufficient to excite serious apprehensions, and to put them on their guard, which, in judgment of law, is deemed competent notice. (1 Atk. 490; 2 Fonb. 155.) The captain, however, before he sailed from Cruzhaven, had actual notice of the blockade; and there can be no doubt but the plaintiffs are liable for his acts. He sailed with the professed intent to evade it, if an opportunity should offer, but under an idea that, by the treaty of 1794, he was entitled to notice to desist, and to be sent back on the first attempt. The provision in the treaty, on this subject, it is obvious, cannot apply to a case, where the party *already possesses* the requisite information. This is the rule in all cases where the party is to be affected by notice.

But it is objected, that the captain was not in the act of breaking the blockade; that it existed merely *in intention*, and he was, therefore, not liable to seizure. If this idea be correct, then no such capture can be lawful, until the line of blockade be actually invaded. The resolution may be formed and acted upon; and no progress in the execution of it can be stopped, or prevented, till the *breach be made*. A

(a) See notes (b) to *Vandenhoeve v. The United Ins. Co. supra*, 144, 168; see also S. C. *infra*, 451.

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construction so forced and limited, appears to me inconsistent with an effectual exercise of the right. It may be difficult to define its precise extent, but it is more reasonable to adopt the rule, that the besiegers are entitled to take *preventive* measures, and that when the resolution to break a blockade is formed and *begun to be executed*, within a reasonable distance, so as to render it practicable, the offence is incurred and the party liable to seizure. Such was the case in the present instance.

From the testimony of the mate, as well as from the sentence, it appears, that an actual blockade was understood, at the time, to exist. As a fact, it seems not to have been questioned. But the particular situation of *the [*187] blockading force does not appear, nor do I think it material. Although the party may have intended to avail himself of an *accidental* interruption, occasioned by winds or tempests, this intent will not excuse him; for such interruption cannot be considered as destroying the existence of the blockade. At least, if he attempts to enter, under such circumstances, it is *at his peril*, and he subjects himself to the *hazard of seizure and confiscation*. I think the reasoning of Sir William Scott, whose opinion is contained in the sentence, annexed to the case, is satisfactory, and that the sentence on the merits was right; and, of course, that the plaintiffs, having forfeited their neutrality, ought not to recover, admitting the sentence to be open to investigation.

It may be proper to add, that the plaintiff here is not entitled to the premium, because the risk had actually commenced, and the warranty was forfeited by a subsequent breach of neutrality.

KENT, J. On the facts in this case, two questions arise:

1. Will a voluntary attempt by the captain to break a blockade be sufficient to destroy the right of recovery on the policy?
2. If it will, is there the requisite evidence in this case of that attempt?

In answer to the first question, I am of opinion, that such

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an attempt takes away from the assured his right to recover ; for he can never be allowed to indemnify himself upon an innocent party, from the consequences of his own want of skill, or from his negligence or folly. The act of the master must be referred to his principal, who appoints him ; and whenever a loss happens through the master's fault, unless that fault amounts to barratry, the owner, and not the insurer, must bear it. It is a fault in the master, to occasion [*188] a loss of property, from *his carelessness or want of competent skill ; and much more is it the case, if he wilfully occasion that loss, as by resisting search, breaking a blockade, &c. He is charged with a discreet and faithful execution of his trust, and it is against his duty to expose the property unnecessarily to risk, either from natural perils, or from perils arising from the violation of his neutrality. It is a point not to be disputed, that an attempt knowingly to break a blockade, is a violation of neutral duty, and occasions a forfeiture of the property ; and it cannot be supposed, unless it be so expressed, that the insurer takes upon himself such risk. The risk of fault in the master (barratry excepted) is not a risk enumerated in the policy ; and it would be very unreasonable, that the insurer should be holden beyond his *express* undertaking, for the fault or folly of the master, whom the insured selects and controls. (Millar, 136-144, 179-188. 2 Valin, 77, 79, 161, 650.)

In answer to the second question, I have no doubt in concluding, that there is sufficient evidence in the case, of a wilful attempt by the captain to break the blockade of Amsterdam. This evidence results from the condemnation in the British court of admiralty ; and for the conclusive effect of that sentence, I refer to my opinion in the cases of *Vandenheuvel v. The United Insurance Company*, and *Vandenheuvel v. Church*.(a) There is also sufficient evidence, without resorting to the sentence. When the captain left Cruxhaven, he sailed *with the understanding* that Amster-

(a) See notes (b) to *Vandenheuvel v. The United Ins. Co. supra*, 144, 168.

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dam was a blockaded port ; and he sailed also under the idea, that if he should meet with a British cruiser in his attempt to enter Amsterdam, he would, for the first attempt, be sent back, and not seized. This appears by the testimony of the mate, and it is sufficient to establish the *fact* of the blockade, as against the plaintiffs, it being the admission of their agent, until they repel it by direct proof to the contrary. But there is no such contrary *testimony [*189] in the case. It would seem, indeed, to be implied, from some of the observations of Sir William Scott, which are thrown into the case, that winds had occasionally *blown off*, or *kept at a distance*, the blockading squadron : but at what precise *time*, or to what precise *distance*, does not appear. We do not know, except by necessary deduction from the testimony of the mate, what was the actual state of the blockade, or how far the British cruisers were at the time in a situation to preserve it. Nor do we know the situation the vessel was in, or her proximity to Amsterdam, when she was captured. The mate inform us only, that the master understood, when he sailed from Cuxhaven, that Amsterdam was blockaded ; that he sailed with an intent to attempt to enter it, and with the understanding that for his first attempt he would only be sent back, and that he was captured the day he sailed. How near he had approached the coast of the Vlie and Texel, we do not know. He might have reached the coast, for it is within the reach of a day's sail. Every reasonable conclusion that the admissions of the mate will warrant, is, however, to be drawn against the plaintiffs, so long as they furnish no other proof to repel those admissions.

My opinion accordingly is, that the existence of the blockade, the wilful attempt of the master to break it, his capture while executing that attempt, and at no great distance from, if not in the neighborhood of the blockading port, are all necessarily to be inferred from the case, and that judgment ought, therefore, to be given for the defendants.

BENSON, J, was of the same opinion.

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LEWIS, J. was absent.

[*190] *LANSING, Ch. J. I must differ in opinion from the rest of the court. The view in which I have considered this subject has led me to conclude, that the blockade, from the circumstances stated in the case, constituted one of those risks intended to be insured against by the policy, it not being in contemplation of the parties, at the time the insurance was made, to *break the blockade*; hence the blockade may well be taken as an event calculated to defeat the voyage, occurring since *its commencement*, and which would not justify the captain to divert his vessel from the port of destination, on the information that a blockade existed.

The British treaty provides, that a vessel which sails for a blockaded port, without knowing of the blockade, shall be turned away from *such port*; but she shall not be detained, &c. unless, after notice, she shall *again* attempt to enter.

The expression appears to me only to apply to the *inception* of the voyage. The knowledge of blockade must exist before her leaving her port of departure. If acquired, in any stage of the voyage, after its commencement, the captain is not, in my opinion, obliged to take notice of it, before an attempt to enter.

The vessel's touching at Cruxhaven was merely in the continuation of the voyage; and hence she was entitled to prosecute her voyage, as if continued without touching at Cruxhaven; and if the British courts have considered the beginning of the voyage as from Cruxhaven, so far as it respects the question between the parties, the ship was entitled to be turned away without seizure, and only subject to condemnation, in case of a second attempt, whatever might be the construction of the admiralty, on general principles, as applied to it.

The question is, was the voyage in its commencement, contrary to the law of nations? Was this an illegal

[*191] *voyage? The touching at Cruxhaven was provided for by the policy. It was a risk the insurer had

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undertaken, and he must submit to the loss ; as in a case of a war breaking out in the course of a voyage.

Judgment for the defendants.(a)(b)

(a) But see S. C. in the Court of Errors, 1 Caines' Cas. in Err. vii.

(b) For the definitions of a blockade consult the opinion of Sir William Scott in *The Vrow Judith*, 1 Rob. 150 ; see *The Byfield*, 1 Edw. 188 ; also 1 Phill. on Ins. 393 ; and 1 Duer on Ins. 647, § 24. Mr. Duer's definition seems on the whole to be the most accurate. See also 1 Kent's Comm. 145 ; Bynkershoek, Q. J. Pub. b. 1, c. 4, § 11 ; Duponceau's Trans. 82.

To make a blockade effective there should be a competent force to support it. Mr. King's Letter to Lord Grenville, May 23d, 1799. Mr. Marshall's Letter to Mr. King, Sept. 20th, 1799. Mr. Madison's Letter to Mr. Pinckney, Oct. 25th, 1801. Letter of the Secretary of the Navy to Commodore Preble, Feb. 4th, 1804. Mr. Pinckney's Letter to Lord Wellesley, Jan. 14th, 1811. In the convention between Great Britain and Russia, on the 27th June, 1801, a blockaded port was declared to be, "that where there is, by the disposition of the power which attacks it with ships stationery, or sufficiently near, an evident danger in entering." The definition in the treaty of commerce between the United States and Chili, in May, 1832, art. 15, and the Peru-Bolivian Confederation in May, 1838, art. 14, of a besieged or blockaded place, is, "one actually attacked by a belligerent force, capable of preventing the entry of the neutral." *The Betsey*, 1 Rob. 93 ; *Williams v. Smith*, 2 Caines, 1 ; *Radcliff v. United Ins. Co.* 7 Johns. 38 ; *The Henrick and Maria*, 1 Rob. 146 ; *The Frederick Molke*, 1 Rob. 86 ; *The Mercurius*, 1 Rob. 83 ; Journal of Congress, vol. 7, p. 241, Dec. 4th, 1781. 1 Kent's Comm. 5th ed. 145 ; 1 Phill. on Ins. 393 ; 1 Duer on Ins. 648. But where such force is sufficient, a temporary removal of the blockading squadron by stress of weather, does not operate as a suspension ; *The Frederick Molke*, 1 Rob. 72 ; *The Columbia*, 1 Rob. 130 ; *The Juffrow Maria Schroeder*, 3 Rob. 155 ; *The Hoffnung*, 6 Rob. 116, 117 ; *The Triheten*, 6 Rob. 65 ; though it will excuse a neutral who is acting in good faith and without notice ; *Radcliff v. The United Ins. Co.* 7 Johns. 54 ; for breach of blockade is regarded as a criminal offence and the intention must concur with the act. See 1 Duer on Ins. 658, *et seq.* If however the removal be caused by the superior force of an enemy, *Williams v. Smith*, 2 Caines, 1 ; Letter of the Secretary of State to Mr. King, Sept. 20, 1799 ; *The Triheten*, *at sup.* ; *The Hoffnung*, *id.* ; or if a part of the blockading force be ordered away on a different service, so that a competent force be not left to make the blockade effective ; *The Nancy*, 1 Act. Ap. Ca. 57 ; it is broken up. But the blockade is not relaxed, where some of the ships are employed in chasing suspicious vessels, that had approached the port, although their absence may leave some of the passages of communication unguarded and open ; for the service in which these ships are engaged, is a necessary part of that to which they were appointed and their absence, like that produced by a stress of weather, is justly regarded as accidental and temporary. *The Eagle*, 1 Act. Ap. Ca. 68. The blockade as far as possible must be preserved by the block-

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ading force so as uniformly to exclude vessels, and therefore if it be relaxed and some vessels be permitted to pass, others have a right to infer that the blockade is raised. *The Rolla*, 6 Rob. 72; 1 Phill. on Ins 393. The violation of a blockade being as before remarked, a criminal act, it must depend upon the *intention* of the party to commit the offence. Whether he had *knowledge* of the existence of the blockade is therefore an essential question in the consideration of this subject. Knowledge is either shown by direct or by presumptive evidence, and if by the latter the presumption may be either of fact or of law. Of the former it is not necessary to speak; of the latter, however, it may be observed,

1. It is the better opinion that a notice of blockade by a blockading to a neutral state, will after a sufficient lapse of time for the latter to notify its citizens or subjects of the fact, be an absolute and irresistible presumption against them; 1 Duer on Ins. 658-660, 691-698; 1 Kent's Comm. 5th ed. 147-151; opinion of Sir William Scott in *The Neptunus Hempel*, 2 Rob. 110; *The Adelaide*, id. 111, note; *The Vrouw Johanna*, id. 109; *The Jonge Petronella*, id. 131; *The Nereide*, 9 Cranch, 440. But this doctrine is assailed by Mr. Wheaton in a note to the case of *Olivera v. The Union Ins. Co.* 3 Wheaton, 196, who argues that the government and courts of the United States have, among other doctrines, constantly maintained, that a mere notification to a neutral minister shall not be relied on as affecting with knowledge of the actual existence of the blockade, either his government or its citizens, and that a vessel cleared or bound to a blockaded port shall not be considered as violating in any manner the blockade, unless on her approach towards such port, she shall have been previously warned not to enter it; in other words, that a neutral ship has in all cases the right to proceed to the very station of the blockading force, for the purpose ascertaining whether the blockade in fact exists, and is never guilty of an attempt to violate the blockade, unless she disregards the warning there received; and cites the following authorities in support of his position. *Williams v. Smith*, 2 Caines, 1. *Vos v. United Ins. Co.* 1 Caines' Cas. in Error, vii. *Liottard v. Graves*, 3 N. Y. Term Rep. 226. *Calhoun v. Ins. Co. of Pennsylvania*, 1 Binn. 293. *Fitzsimmons v. Newport Ins. Co.* 4 Cranch, 185. *Sperry v. Delaware Ins. Co.* 2 Wash. C. C. R. 243. *King v. Same*, *ibid.* 300, and *Radcliff v. United Ins. Co.* 7 Johns. 38. Mr. Duer however, 1 Duer on Ins. 691, *et seq.* closely analyses these authorities and arrives at the conclusion stated above. Upon the 18th section of the treaty of 1794, between Great Britain and the United States, which is in the following words: "And whereas it frequently happens, that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded, or invested, it is agreed, that every vessel so circumstanced, may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter, but she shall be permitted to go to any other port or place she may think proper;" he observes, "The positions of the learned reporter will be found to derive as little support, from any decisions of the American courts, that are justly entitled to authority, as from the conduct of the American government. In the case of *Williams v.*

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Smith, 2 Caines, 1, the blockade had in fact been raised a few days before the vessel arrived off the port, and the whole extent, of the decision was, that there must be an actual existing blockade to render it unlawful for the neutral to enter; and for this construction of the general language of the court we have the positive authority of the same court in the subsequent case of *Radeliff v. United Ins. Co.* 7 Johns. 55." Upon the decision in the principal case in the Court of Errors, *infra*, 469; S. C. 2 Caines' Cas. in Err. 7, and *Liotard v. Graves*, 3 Caines, 226, he remarks, 1 Duer on Ins. 696-698, n. "The decision in these, it cannot be denied, if admitted to be law, would sustain the doctrine of the learned reporter in its fullest extent. In the first of these the New York Court of Errors decided that a neutral ship, destined to a blockaded port, with an actual knowledge of the blockade, and an express intention to violate it, is not liable to capture during the voyage, on the ground that until her arrival at the very entrance of the blockaded port, there can be no attempt to violate the blockade, but a mere intention. To this reasoning a sufficient reply will be found in the text, and to admit its force, would be to contradict all the decisions both in England and in the United States, of the courts of common law, as well as of the admiralty, in which a voyage is held to be illegal at its commencement, by reason of the illegality of its ultimate purpose. As this decision of the Court of Errors was on a question that exclusively belongs to the law of nations, it is not to be considered as evidence, for reasons that have already been stated, of the existing law, even in the State of New York. The case of *Liotard v. Graves* is a mere reiteration of the doctrine in *Vos v. The United Ins. Co.*, and was founded on the authority of that decision. It must therefore share its condemnation. It is unnecessary to detain the reader with any other further observations. It is certain that the only tribunal in the United States, that has the right to speak with authority on questions of this nature, the Supreme Court of the United States, has never maintained any doctrine, at all, inconsistent with that of the English admiralty which I have adopted in the text; but that, on the contrary, its decisions, so far as they have gone, entirely coincide with those of Sir William Scott. I conclude with referring to the authority of Chancellor Kent, a reference which many readers may be disposed to think might supersede of itself the necessity of this long discussion. He expressly says, that a notice to a foreign government, is a notice to all the individuals of that nation, and they are not permitted to aver ignorance of it, because it is the duty of the neutral government to communicate the notice to their people; and he admits the rule to be established, that where a neutral ship sails for a blockaded port with a knowledge of the blockade, actual or constructive, and an intention to violate it, the offence is so far complete as to authorize her immediate capture—and as evidence of the understanding of our own government he refers to an ordinance of Congress of 1781, which goes to the full extent of the English rule, by making it lawful to take and condemn all vessels of all nations destined to a blockaded port. 1 Kent's Com. 5th ed. p. 147-151."

2. It is a presumption of law that the inhabitants of a blockaded port know the fact, and therefore the exit of a vessel with a cargo, shipped after a blockade has commenced, unless it be so recent as to have been probably unknown

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when she sailed, is unanswerable evidence of an intention to violate it. *The Frederick Molke*, 1 Rob. 86. *The Vrouw Judith*, id. 150. *The Adelaide*, in *notis*, 2 Rob. 111. *The Here*, 1 Act. Ap. Ca. 261.

3. Mr. Duer thinks that it may be safely assumed as the general rule, that the notoriety of the fact that a blockade exists at a port when a voyage is commenced, that a knowledge of the blockade would render illegal, will in all cases raise a presumption by which the party charged with the offence may be justly concluded. 1 Duer on Ina. 661, referring to the argument of Sir William Scott in *The Adelaide*, *ut sup.* and *The Calypso*, 2 Rob. 298.

As a general rule a blockade may be violated by an attempt to enter or go out from the blockaded port. *The Frederick Molke*, 1 Rob. 86. "The attempt is, in the judgment of law, an actual breach. Nor in the application of this rule is the word 'attempt' to be understood in a literal or narrow sense. It is not confined to the conduct of the ship when she has reached the very mouth of the blockaded port, and only the act of entrance remains to complete the voyage. It embraces the whole voyage, when that voyage is begun with a knowledge of the blockade and an attempt to violate it. The offence, in such cases, is complete from the moment that the vessel quits her port of departure; and when the necessary knowledge is first imparted, during the voyage, its continued prosecution involves the crime and justifies its penalty. It is true, that the propriety of considering the entire voyage as a continued attempt to violate the blockade, has been strongly questioned; but on examination, the doctrine will be found to rest on the firmest grounds of reason and authority. Were all vessels, destined to a blockaded port, permitted to approach the entrance of the harbor, so many would be enabled to enter, that the blockade would soon become ineffectual. Its main object, that of distressing the enemy by intercepting his necessary or usual supplies, would be defeated, and to prevent this, the rule that renders the vessels, so destined, liable to capture during the voyage, is indispensable. The same rule, we have already seen, prevails in all analogous cases without an exception. In all other cases where the ultimate purpose of the voyage is unlawful, it renders the voyage illegal at its inception; and the liability to seizure that there attaches, continues until the voyage is completed, or until the unlawful purpose has been abandoned, or its execution is no longer practicable. It would be a strange anomaly, if a voyage to a blockaded port, with the intent of breaking the blockade, were to be alone exempt from the application of this general rule, notwithstanding the contemplated act is regarded by all the writers on public law as the most noxious violation of neutral duty, and therefore fit to be restrained by the severest penalty. The objection that during the voyage there is no substantive offence, but a mere intention, that possibly may not be executed, and cannot, therefore, without a violation of principle, be justly treated as a crime, equally applies to all the cases where the illegality of the voyage arises solely from the illegality of its uncompleted purpose, and, in all, the reply that is given is equally conclusive. It is not a mere intention that the law punishes; but the commencement of the voyage is an overt act in execution of the unlawful intent; an act by which the execution of the in-

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tention is begun ; and were the mere possibility that its execution may not be completed permitted to suspend the penalty, it could rarely or never be enforced, since this possibility exists until the unlawful design is fully accomplished, and the offender, in most cases, has been placed by its accomplishment beyond the reach of the law." 1 Duer on Ins. 665, 666, and authorities. This rule does not apply where the vessel sails from a distant country with a clear intention to avoid the blockaded port, unless the blockade shall be raised. *Id.* 667-670. Any entry or attempt to enter by a neutral vessel, though only in ballast, is a breach of the blockade ; *The Comet*, 1 Ed. 32 ; but see 1 Duer on Ins. 672, n. (a) ; unless indeed it be enforced by a paramount necessity, as by the stress of weather ; *The Fortuna*, 5 Rob. 27 ; *The Elizabeth*, 1 Ed. Ad. De. 198 ; *The Arthen*, 1 id. 202 ; *The Hurtige Hans*, 2 Rob. 124 ; *The Charlotte*, 1 Edw. 252 ; but the egress of a neutral vessel, in ballast ; *The Comet*, *ut sup.* ; or with a cargo on board clearly proved to have been purchased and delivered before the existence of the blockade was known, is not so. 1 Duer on Ins. 681, citing *The Vrouw Judith*, *The Neptunus*, *The Byfield*, *ut sup.* and *The Calypso*, 2 Rob. 298. See also, *The Juno*, id. 118 ; *The Poledam*, 4 id. 189 ; *Olden v. McCheeney*, 5 Serg. & Rawl. 271 ; *Olivera v. The Unit. Ins. Co. ut sup.* This whole subject is elaborately considered in the works of Mr. Duer, vol. 1, p. 643-698 ; Mr. Phillips, vol 1, p. 392-400 ; Chancellor Kent, vol. 1, p. 143-152 ; and Mr. Wheaton on the Law of Nations, to which the reader is respectfully referred.

 JOHN JACKSON *against* THE NEW YORK INSURANCE COMPANY.

A vessel belonging to A. who was a natural born citizen of the United States, was insured, by a policy, dated the first of November, 1796, on a voyage from New York to London ; and was warranted American property. Afterwards, and before the vessel actually sailed on the voyage insured, viz. on the 27th of April, 1797, A. sold and transferred the vessel to B. a native of Great Britain, who had emigrated to New York, and become a naturalized citizen of the United States, on the 6th of April, 1797. The vessel having been captured by the French, and condemned as good prize ; it was held, in an action on the policy, that B. was to be considered as having emigrated, *flagrante bello*, and a British subject, so as to justify the condemnation ; and that A. having by his own act, before the commencement of the risk, changed the property from neutral to belligerent, there was a breach of the warranty. (a)

(a) See *Duguet v. Rhinelanders*, *infra*, 476 ; *Caines' Cas. in Err.* xxix, where this principle is reversed. S. C. *supra*, vol. 1, p. 360.

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THIS was an action on a policy of insurance, on the ship Oneida, from New York to London, warranted American property, proof of which, if required, to be made in New York. The policy was dated the 1st of November, 1796, when the ship was owned by the plaintiff, a natural born citizen of the United States. Afterwards, on the 29th of April, 1797, and before the vessel sailed on the voyage insured, the plaintiff sold and transferred her to James Jackson, a British subject; but who became a naturalized citizen of the United States on the 6th of April, 1797. The Oneida set sail from New York on the 3d of May, 1797, and was captured on the 25th of the same month, by a French privateer, and carried into Nantz, and there condemned. The [*192] grounds of *the condemnation as they appeared from the *procès verbal*, were:

1. The want of a *role d'équipage*, as required by the French regulations of 1704, 1744 and 1778:

2. That the manifest was not signed by a public officer:

3. That James Jackson confessed himself to have been born in England, and did prove his naturalization in the United States.

The principal reason, however, was the want of a *role d'équipage*, and the court adjudged "the ship good prize, as belonging to the enemies of the republic, for want of regularity in the sea papers."

The sentence of condemnation was confirmed on an appeal. The ship was duly abandoned to the defendants.

At the trial, at the November circuit, 1799, in New York, a verdict was taken for the plaintiff, subject to the opinion of the court on a case containing the above facts.

Hamilton, Riggs and Evertson, for the plaintiff.

B. Livingston and Burr for the defendants.

RADCLIFF, J. 1. It is sufficient to decide this case, that the plaintiff has not maintained his warranty, according to the principles already determined on this subject. (1 Johns. Cas. 16, 341, 360.) But,

2. Here was a transfer of the property, subsequent to the insurance, to one, who in view of the belligerent parties was

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not entitled to be regarded as a neutral. James Jackson emigrated *flagrante bello*; and we have already decided, (1 Johns. Cas. 360;)(a) that no citizen or subject of either of the parties at war, can change his allegiance, so far as to alter *with respect to them, the relation in which he [*193] stood at the commencement of the war. The French had, therefore, a right to consider him as a British subject; and the ship, after being transferred to him, was liable to seizure and condemnation by them, as enemy's property. The risk, therefore, was essentially altered and increased; and the plaintiff, by the transfer, voluntarily destroyed the neutrality which he had guarantied to maintain. The plaintiff, therefore, cannot recover on the policy, but as he has not committed any actual fraud, and the risk never commenced, he is entitled to a return of premium, on the principle adopted in several cases, (1 Johns. Cas. 310,)(b) already decided in this court.

KENT, J. This cause offers two points for our consideration:

1. What effect, if any, is the sale of the ship to James Jackson to have upon the policy?

2. If none, then is there the requisite evidence of a breach of the warranty?

1. The policy was subscribed in November; and in the April following, and previous to the sailing of the ship, the plaintiff sold her to James Jackson. He was born a British subject, and was naturalized on the 7th of April, 1797. How long previous thereto, James Jackson had fixed his domicil in this country, does not appear. The act of Congress, of the 27th of March, 1790, required only a previous residence of two years. The act of Congress, of the 29th of January, 1795, enlarged the term of residence to five years, but provided that the enlargement of the term should not apply to aliens then resident within the United States. As James Jackson was naturalized within two years and three months from the time of passing the last act, the naturalization is

(a) But see 1 Caines' Cas. in Err. xrv.

(b) And see 313, n. (a).

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proof of his residence here in January, 1795; but it is no evidence of any previous residence. The presumption [*194] *antecedent to that time must be, that he resided under the jurisdiction of the king of Great Britain, as every person's domicil must be presumed, until the contrary be shown, to be in the country where he was born, and to which he owes his native allegiance. In January, 1795, the war between Great Britain and France had already existed for two years, and James Jackson is accordingly to be considered as changing his domicil, and emigrating, *flagrante bello*.

This natural, and as it appears to me, legal presumption, is strengthened by this further consideration, that we are to conclude, from the fact of his subsequent naturalization, that James Jackson came to this country with a view of becoming a citizen; and in that case, that he would not have postponed the solemnity, for any considerable time beyond the period prescribed by law; and if he had in fact fixed his residence here before the commencement of the war, he was entitled to the privilege of naturalization two years, at least, before he actually obtained it.

The case of *Duguet v. Rhineland*, (1 Johns. Cas. 360;) (a) is in point. The plaintiff there was a Frenchman by birth, and was naturalized here the 11th of October, 1796; and there was no proof in the case of any previous residence. The decision of the court, accordingly, went upon the ground of his emigration here during the war, and that he was, therefore, in the purview of the law of nations, to which the warranty had reference, still a Frenchman.

My conclusion then is, that the plaintiff did, by his own act, and without the assent of the insurer, (for none appears,) change the property which he had warranted neutral, into belligerent property; and this too before the commencement of the risk.

Upon such an act, I have no difficulty in declaring what must be the result. A warranty must be true at the com-

(a) But see 1 Calnes' Cas. in Err. xxv.

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mencement of the risk. (Doug. 732. *Eden v. *Parkinson*, Park, 353.) This was not so; and [*195] what renders the case the stronger, and would, perhaps, have been decisive, if done even after the risk begun, is that the property ceased to be neutral, by the act of the party himself. It would be against all rule and right for a party in such a case, to avail himself of a loss, the consequence of his own voluntary deed; and therefore, without having any reference to the sentence of condemnation, I think the plaintiff ought not to recover beyond the amount of his premium, subject to the deduction stipulated in the policy.

BENSON, J. was of the same opinion.

LEWIS, J. was absent.

LANSING, Ch. J. not having heard the argument, gave no opinion.

Judgment for the plaintiff, for a return of the premium only.(a)

(a) Upon the principle of this case Mr. Duer remarks: "In the United States, it appears to be settled law, that a native subject can not acquire a foreign domicile by an emigration from his own country, during the existence of hostilities, (*flagrante bello*), so as to protect his trade during the war, either against the belligerent claims of his own country, or against those of a hostile power. *The Dos Hermanos*, 2 Wheat. 78. *Duguet v. Rhinelander*, 1 Johns. Cas. 360. *Jackson v. N. Y. Ins. Co.* 2 Johns. Cas. 191. Contra—*Duguet v. Rhinelander*, 1 Caines' Cas. in Err. xxv. S. C. 2 Johns. Cas. 476. Vattel, liv. 1, c. 19, liv. 2, c. 27. Grotius De Jur. Bel. ac Pac. liv. 2, c. 5, § 2. Puffendorf, Droit des Gens par Barbeyrac, liv. 8, c. 11, § 3. In other words, his native character is wholly unchanged by his change of residence. He is as much bound to abstain from a trade with the public enemies of his own country, as if he had remained at home; and his property, as that of an enemy, continues to be just as liable to seizure and confiscation, by an opposite belligerent. The ground of this doctrine is, that there rests, upon every subject or citizen, a moral obligation, not to abandon his country in a time of war, without the express sanction of the government. The personal services, and the property, of each separate individual, are a component part of the national resources, on which the government relies, in declaring a war; and to withdraw these, when his country may require their aid, is a breach of the duty that springs from the necessary relation that each individual bears to the political society of which he is a member. A contrary doctrine, it has been truly observed, would be inconsistent with the soundest maxims of national po-

 Seaman v. Haskins.

W. SEAMAN against B. F. HASKINS.

A. being indebted to B. in the sum of 1785 dollars, for goods sold and delivered, and to other creditors, on the 1st of January, 1793, executed a bond to C. and D. for 22,500 dollars, for and on account of all his debts, and including the sum due to B. on which bond a judgment was entered in April, 1793. Afterwards, on the 18th of July, 1793, A. gave B. a single bill for the 1785 dollars; and on the 1st of August, 1793, B. affirmed the trust in C. and D. as to the judgment, and on the 2d of August, directed a *ca. es.* to be issued on the judgment, on which A. was taken into custody, and afterwards, by consent of B. was discharged. In an action brought by B. on the single bill against A. it was held, that B. having as a *cestuy que trust* of the judgment, affirmed the trust, and elected to proceed on the judgment, and to obtain satisfaction of his debt; the single bill was thereby discharged.

A judgment being a debt of a higher nature will be sufficient to discharge a bond if accepted as a satisfaction.

THIS was an action of debt. The declaration was on a single bill, for 1785 dollars and 85 cents, dated the 18th of July, 1793. The defendant pleaded, 1. *Non est factum.* 2.

Payment. 3. That "on the first day of January, 1793, [*196] he, the said Benjamin, was, at the city, "county and ward aforesaid, indebted to the said Willet, in a large sum of money, to wit, the sum of 1785 dollars and 85 cents, for goods, wares and merchandizes, then before that time, there sold, and delivered by the said Willet to the said Benjamin; and being so indebted, he the said Benjamin, afterwards, to wit, at the city, county and ward aforesaid, made and executed a certain writing obligatory, to a certain Anthony Franklin, Joseph Bird and Edmund Prior, for a large

they, since it would enable and encourage mercantile men, at the commencement of every war, to change their residence and character, in order to exempt themselves from its necessary burdens and apprehended losses. It is for these reasons, that the principle in question has been sanctioned, by many of the most approved writers on the law of nations; and, although it has not yet been expressly affirmed, so far as I have been able to discover, by any decision of the English admiralty, I doubt not that its authority, as binding on the court, should the question arise, would be promptly admitted and followed." 1 Duer on Ins. 521, 522, § 35. See id. 547.

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sum of money, to wit, 9000 pounds, being of the value of 22,500 dollars, for, and on account of the said sum of money, so due to the said Willet, for the said goods, wares and merchandizes, so as aforesaid sold and delivered by the said Willet to the said Benjamin, and for, and on account of all other moneys owing by the said Benjamin; and that, afterwards, to wit, of the term of April, 1793, the said Anthony Franklin, Joseph Bird and Edmund Prior, recovered judgment, on the said writing obligatory, for 9000 pounds, being of the value aforesaid against the said Benjamin; and that afterwards, to wit, on the said 18th day of July, 1793, at the city, county and ward aforesaid, the said Benjamin made and executed the said bill obligatory, in the declaration of the said Willet mentioned; and the said Benjamin avers, that the said bill obligatory, in the said declaration mentioned, was made and executed by him to the said Willet, for the same sum of money due to the said Willet, for the said goods, wares and merchandizes, so as aforesaid sold and delivered; and the said Benjamin further avers, that the said judgment, so as aforesaid recovered, for and on account of the said sum of money so due to the said Willet, as for and on account of all other moneys owing by the said Benjamin, exceeded the whole amount due and owing from him; and the said Benjamin further avers, that the said sum of 1785 dollars and 85 cents, part of *the said sum of 9000 [*197] pounds, being of the value of 22,500 dollars; and the said sum of 1785 dollars and 85 cents, in the bill obligatory, in the declaration of the said Willet, is one and the same sum of money, and not different: And the said Benjamin further avers, that the said Willet, afterwards, to wit, on the first day of August, 1793, at the city, county and ward aforesaid, accepted the said judgment, so recovered by the said Anthony Franklin, Joseph Bird and Edmund Prior, in full satisfaction and discharge of the said bill obligatory, in the said declaration of the said Willet mentioned; and that afterwards, to wit, on the second of August, in the said year 1793, at the city, county and ward aforesaid, the said Benjamin, at the request of the said Willet, was taken into custo-

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dy by the sheriff of the city and county of New York, on a *copias ad satisfaciendum*, issued on, and by virtue of the said judgment, and was afterwards, to wit, on the first day of January, 1795, at the city, county and ward aforesaid, by the consent of the said Willet, discharged from the said custody of the said sheriff: And this he is ready to verify, wherefore," &c.

There was the usual replication, and issue, as to the first and second pleas. To the third plea there was a demurrer and joinder.

Colden, in support of the demurrer.

Burr, contra.

KENT, J. delivered the opinion of the court, (LEWIS, J. absent.)

The demurrer admits all the facts stated in the last plea; and the question then is, whether those facts do not amount to a satisfaction of the bill.

[*198] *A judgment being a debt of a higher nature, will be sufficient to discharge a bond, if accepted, as a satisfaction. It is a certain and valuable satisfaction. The only objection to it, in the present case, is, that it was not stated to have been regularly assigned to the obligee, and placed under his power, by the act of the trustees. But upon examination of the plea, this appears to be sufficiently, although not expressly, alleged. The plaintiff, as *cestuy que trust*, affirmed the trust, and accepted the judgment in satisfaction, and proceeded to exercise power over it. Acceptance, here, is a relative term, and implies the previous offer, the requisite act on the part of the trustees, as owners of the judgment. We must intend this assent from the plea; and, consequently, the plea was sufficient.

Judgment for the defendant.(a)

(a) See principal note to *Coit v. Houston*, *infra*, vol. 3, p. 243; *Furman v. Haskins*, 2 Caines' R. 369; *Thatcher v. Dudley*, 2 Root, 169; see *Bank v. Letcher*, 3 J. J. Marsh. 196.

Rankin v. Blackwell.

RANKIN *against* BLACKWELL, SURVIVOR OF HALLETT.

Where there are strong circumstances, to suspect a note has been fraudulently altered, general corroborating circumstances may be admitted in evidence to strengthen the suspicions ; as that other notes drawn and indorsed by the same parties, to take up one of which the note in question was given, had been altered.

THIS was an action of *assumpsit*. The plaintiff declared on a promissory note, drawn by Blackwell and Hallett, in favor of Arnold and Ramsay, and indorsed by them to the plaintiff. The cause was tried at the last March sittings, in New York, before the chief justice.

The signature of Blackwell and Hallett was proved to be in the hand-writing of Hallett. The defence set up, was, that the note, after it had been made and issued, had been altered, in the date, and by changing three hundred into thirteen hundred dollars. To support this defence, the defendant offered to prove, 1. That former notes drawn and indorsed by the parties, "and to take up [*199] one of which the present note was made, had been altered ; 2. A written memorandum made by his deceased partner, of the amount of the note, as actually made ; 3. The alterations apparent on the note itself, from which the jury might decide whether the note had been altered or not ; but the judge overruled the evidence offered, and charged the jury, that the mere appearance of alterations on the face of the note, unaided by any proof as to the character of the persons through whose hands it had passed, was not sufficient to support the defence set up. The jury, accordingly, found a verdict for the plaintiff, for the full amount on the face of the note, with interest.

A motion was made to set aside the verdict, and for a new trial.

Riker, for the defendant.

B. Livingston, contra.

Per Curiam. The defence in this case rested on the

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proof of forgery. The evidence that former notes drawn and indorsed by the same parties, to take up one of which the present note was given, had been altered, ought to have been admitted; for it would have served to show what was the real consideration for the note, and thus lead to the detection of the forgery. The mode of this proof is not stated; but we must presume, that it would have been legal. Where a defendant can show strong circumstances, such as erasures, &c. to render a note suspicious, he ought to be allowed to go into evidence of general corroborating circumstances, to strengthen that suspicion.

The memorandum of the deceased partner was properly rejected; for it was nothing more than the act of [*200] the party himself. The alterations on the face of the note, unsupported by other proof, would not be competent evidence; but if any previous testimony had been offered, to show that the note was given for a less sum, or to render it probable that a fraud had been committed, the alteration on the face of the note would have been a strong corroborating circumstance, if not decisive, of the truth of the fact. On the first ground, we think that there ought to be a new trial, with costs to abide the event of the suit.

New trial granted.(a)

(a) See Cowen & Hill's notes to 1 Phill. Ev. 298, 299, 300, 453; *Cumberland Bank v. Hall*, 1 Halst. 215; see *Sayre v. Reynolds*, 2 South. 737.

 Van Bramer v. The Executors of Hoffman.

 VAN BRAMER AND WIFE *against* THE EXECUTORS OF
HOFFMAN.

A. devised his lands to his two sons, charged with the payment of specific sums by each to his executors, and bequeathed to his granddaughter, two hundred pounds, to be paid to her when she came of age, out of the sums so directed to be paid by his sons to his executors. It was held, that the legacy to the granddaughter, carried interest from the time it was due, and not before; and that it was due when the legatee arrived at the age of twenty-one years.

Where a legacy is given to a child, payable at a particular time, and no provision is made for its maintenance, equity will decree interest from the testator's death, by way of maintenance. But this rule does not apply to a legatee who is a grandchild. *Per Radcliff, J.*

If a legacy be charged on land, and no time of payment is mentioned in the will, the rule is that it shall carry interest from the time of the testator's death. *Per Radcliff, J.*

THIS was a suit for a legacy. At the last Columbia circuit, a verdict was taken for the plaintiff, subject to the opinion of the court on the following case:

Anthony Hoffman, by his last will, dated the 6th of February, 1784, devised to his son, Nicholas, all his lands lying in the county of Dutchess, and to his heirs forever; and after giving an annuity to his wife, the testator added, "it is my will and desire, that my said son, Nicholas, his heirs or assigns, should well and truly pay or cause to be paid, to my executors, hereinafter named, the sum of six hundred pounds, after the decease of his wife;" and he made that part of his estate devised to Nicholas, chargeable with the payment of the same. He also devised to his son, Abraham, all his real estate in Ulster county, which he made chargeable, in like manner, with the payment of five hundred pounds. He then made a bequest to Saretie, [*201] the wife of the plaintiff, in the following words: "I also give and bequeath to my granddaughter Saretie, daughter of my deceased daughter Annatie, the sum of two hundred pounds, current money of New York, to be paid unto her, after the decease of my said wife, when she comes to the

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age of twenty-one years, by my said executors, hereinafter named, out of the moneys which I have before ordered to be paid unto them, by my said sons, Abraham and Nicholas; and in case my said granddaughter should die before the age of twenty-one years, without lawful issue, that then, in such case, it is my will and order, that the said legacy shall descend and devolve to all my above named children, and be divided by them, share and share alike." The testator's granddaughter, Saretie, was also one of the residuary legatees. The testator died the 5th December, 1784. His wife died the 28th March, 1785, and the granddaughter came of age the 18th June, 1785.

The estate to the two sons yielded each about forty-two pounds yearly.

The only question submitted to the court was, from what time interest was to be calculated on the legacy to the wife of the plaintiff; whether from the death of the testator, the death of his wife, or from the time the legatee came of age? And the verdict was to stand, or be modified, according to the opinion of the court.

Gardenier, for the plaintiff.

Sylvester, contra.

RADCLIFF, J. delivered the opinion of the court. If a legacy be charged on land, and no time of payment is mentioned in the will, the rule is, that it shall carry interest [*202] from the time of the testator's death, because "the land yields rents and profits. (3 Wooddes. 520. 2 Salk. 415. 1 Ves. 310.) (a) But this is not to be considered as a legacy chargeable on real estate; for although the moneys to be paid by the devisee of the testator are so

(a) [Old Note.] If a legacy be charged on *personal estate*, as mortgages bearing interest, or on stock yielding profits, the same prevails. 3 Wooddes. 520. If it is to come generally out of the personal estate, and no time of payment is fixed, it carries interest from one year after the testator's death. 3 Wooddes. 520. 1 Ves. 310. So, if a legacy be charged on a *dry reversion* it will carry interest after one year, that being a convenient time for the sale. Where a legacy is payable at a certain time, it will bear interest from that time, though not demanded. 3 P. Wms. 125. 2 Salk. 415, 416. 1 Vern. 262. 2 Vez. 568. 3 Bro. C. C. 419.

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chargeable, and are the fund out of which the legacy is to be paid, yet the charge on the real estate was not made with a view to this legacy, or for the benefit of the legatee, but for the purpose of raising a general fund in the hands of the executors; and which, when paid to them, is to be regarded as personal estate. The legacy is to be paid out of this fund, which is of a larger amount, and not appropriated solely to this object. In this point of view, it is immaterial whether the real estate produced profits or not.

Where a legacy is given to a child, payable at a particular time, and no provision is made for its maintenance, equity will decree interest from the testator's death, by way of maintenance. (1 Ch. Ca. 60. 1 Ves. 307, 310. 2 Vent. 346. 2 Atk. 330. 3 Atk. 102. 2 Bro. C. C. 69. 3 Wooddes. 520.) But this is not the case of a *child* destitute of any provision for its support, and on that account entitled to interest as a suitable maintenance. And the rule does not apply to a legatee who is a *grandchild*. (1 Ves. 211. 1 Atk. 505. 2 Atk. 330. 3 Atk. 101.) Besides, the legatee in the present case had a father living, as we are to presume, and capable of maintaining her. There are other cases, also, in which a court of chancery refuses to grandchildren *the relief afforded to children who are legatees. (2 [*203] Fonb. 32.)

We are of opinion, therefore, that the legacy in the present case ought to carry interest from the time it was due, and not before; and it was due when the legatee arrived at full age.

Judgment accordingly.(a)

(a) See Jarman on Wills, Perkin's ed. 759; *Crickett v. Dolby*, 3 Ves. Jr. Sumner's ed. 10, and note; *Lupton v. Lupton*, 2 Johns. Ch.; *Daves v. Swan*, 4 Mass. R. 208; see *Miles v. Hested*, 5 Binn. 477, and references.

Cole v. Hawes.

COLE against HAWES.

Where the grantor in a deed covenanted generally, that he was well seised, &c. and had a good right to convey the premises, &c. and then added further, that he warranted the premises to the grantee and his heirs, "against all claims and demands, except the lord of the soil;" it was held, that both covenants must be taken and construed together, and that the last qualified and restrained the first.

THIS was an action of covenant, brought on the covenant of *seisin*, contained in a deed of bargain and sale, executed by the defendant to the plaintiff, for certain lands in the county of Columbia.

The declaration stated the covenant to be, that the grantor, at and until the sealing and delivering of the deed, was well seised of the premises thereby bargained and sold, and that he had good right to bargain and sell the same, &c. and averred, that the defendant, at and until the sealing and delivering of the deed, was not well seised, &c. The defendant craved *oyer* of the deed, in which was the following clause, in addition to the covenant of *seisin*: "Furthermore I, the said Lymen Hawes, do bind myself, my heirs and assigns; firmly by these presents, to warrant and defend the above granted and bargained premises to him the said John Cole, his heirs and assigns for ever, against all claims and demands whatever, except the lord of the soil. In witness," &c.

The defendant then pleaded, that at the time of the executing of the deed, one D. Penfield was seised of the premises in fee simple, and was the lord of the soil [*204] thereof; and that, except as to the right and title of the said D. Penfield, the defendant had good right to convey, as mentioned in his deed.

To this plea the plaintiff demurred, and the defendant joined in demurrer.

W. W. Van Ness, for the plaintiff.

Spencer, contra.

Per Curiam. The suit is on a covenant in a deed, that

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the defendant was seised of the premises, and had a right to convey. The plea states, that the defendant warranted the land against all but the lord of the soil, and that as against all but the lord of the soil, he was well seised, &c.

The last covenant explains the first; and in construing, them, both must be taken together. The deed itself declares, that there existed, distinct from the grantor, a lord of the soil. This was explicitly told to the grantee, by the deed. It is not to be supposed that the defendant would, in one line, covenant absolutely that he was seised, when he admitted, and it was so understood by both parties, that there was a lord of the soil, and when, in the next line, the defendant only warranted against all, *except the lord of the soil*. This exception was manifestly intended to apply to both covenants. The spirit of the agreement, and good sense, as well as justice, require such a construction.

We are, therefore, of opinion, that the defendant is entitled to judgment.

Judgment for the defendant.(a)

(a) Exposition must be upon the whole instrument, *ex antecedentibus et consequentibus*, and according to the reasonable sense and construction of the words. Per Lord Ellenborough in *Iggulden v. May*, 7 East, 241. *Trenchard v. Hoskins*, Winch, 93. *Doe d. Spencer v. Godwin*, 4 M. & S. 265. *Barton v. Fitzgerald*, 15 East, 541. *Doe d. Bish v. Keeling*, 1 M. & S. 95. *Sicklemore v. Thistleton*, 6 ibid. 12. *Earl of Clanrickarde's case*, Hob. 275, 277. *Noke's case*, 4 Co. 81, a. *Kingston v. Preston*, 2 Doug. 689. *Pigot v. Bridge*, 1 Vent. 292. *Ferrers v. Newton*, 1 Sid. 312. *Foord v. Wilson*, 2 Moore, 592. *Glazebrook v. Woodrow*, 8 T. R. 370. *Watchman v. Crook*, 5 Gill & Johns. 239. *Ludlow v. McCrea*, 1 Wend. 228. *Marvin v. Stone*, 2 Cowen, 781. *Quackenboss v. Lansing*, 6 Johns. 49. Thus Plowden says, the scope and end of every matter is principally to be considered; and if the scope and end of the matter be satisfied, then is the matter itself and the intent thereof also accomplished. Plowd. 18, cit. per Lord Ellenborough, 8 East, 89. Lord Hobart also coincides in the same views, saying, the law, being to judge of an act, deed, or bargain, consisting of divers parts, containing the will and intent of the parties, all tending to one end, doth judge of the whole, and gives every part his office to make up that intent, and doth not break the words in pieces. Hob. 275. For the general rules in relation to the construction of covenants; see 1 Bouvier's Law Dic. tit. Construction and references; 2 Bl. Com. 379; 2 Com. on Cont. 23 to 28; 3 Chit. Com. Law, 106 to 118; Poth. Oblig. P. 1, c. 1, art. 7; 2 Evan's Poth. Ob. 35; Long on

Dole v. Moulton and others.

[*205] **DOLE**, Sheriff of Rensselaer, *against* **MOULTON** and others.

A bond was given to the sheriff by a prisoner in execution, to remain a faithful prisoner within the liberties of the prison. The prisoner, afterwards, accidentally, walked sixteen feet over the prescribed limits, which in many parts were bounded by an imaginary line, and returned immediately, without the knowledge of the sheriff, and before any action brought: it was held, that no action could be maintained on the bond, which was given for the indemnity only of the sheriff, and this being a mere voluntary escape, and a voluntary return, before action brought, the sheriff could not be damaged.

In bonds for the performance of covenants and for indemnity the penalty is not recoverable. Courts of law are invested with an equitable jurisdiction on the subject, and the true question in courts of law as well as in courts of equity, is now a question of damage. *Quantum damnificatus* is the true point in issue in all such cases. Per *Lansing*, Ch. J.

THIS was an action of debt, on a bond. The defendant craved *oyer* of the condition of the bond, which was, that if Moulton, then confined in the jail of the county of Rensselaer, in the custody of the plaintiff, as sheriff, on a *ca. sa.* at the suit of Elisha White, &c. should remain a true and faithful prisoner, within the liberties of the jail, &c. They then pleaded, 1. *Non est factum*; 2. That the defendant did remain a true and faithful prisoner within the liberties, &c. 3. That "on the 10th July, 1799, at Troy, in the county of Rensselaer, the said Josiah Moulton was walking within the bounds, or limits prescribed by law, for the liberties of the jail, or prison, which limits were not defined by visible objects, but in many parts terminated by an imaginary line,

Sales, 106; 1 *Fonb. Eq.* 145, n. b; *Ib.* 440, n. l; *Whart. Dig. Contract*, F.; 1 *Powell on Contr.* 370; *Shepp. Touchst.* c. 5; *Louis. Code*, art. 1940 to 1957; *Com. Dig. Merchant*, (E. 2.) n. (j); 8 *Com. Dig. tit. Contract*, iv.; *Lilly's Reg.* 794; 18 *Vin. Abr.* 272, tit. Reference to Words; 16 *Vin. Abr.* 199, tit. Parols; *Hall's Dig.* 33, 339; 1 *Ves. Jun.* 210, n.; *Vattel*, B. 2, c. 17; *Chit. Contr.* 19 to 22; 4 *Kent, Com.* 419; *Story's Const.* § 397-456; *Ayl. Pand. B.* 1, tit. 4; *Rutherf. Inst. B.* 2, c. 7, § 4-11; 20 *Pick.* 150; 1 *Bell's Com.* (5th ed.) 431. See also 2 *Steph. Nisi Prius*, 1053, *et seq.*; 1 *United States Dig.* 675, *et seq.*; where numerous authorities can be found in support of the principle of *Cole v. Hawes*.

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and being so walking within the said limits next or adjoining to the bounds of the said jail or prison, terminated by such imaginary line as aforesaid, he the said J. M. casually and accidentally, in walking as aforesaid, crossed and went without the said prescribed limits of the said prison, the distance of sixteen feet, and no more, and thereupon, and immediately thereafter, and without any fresh or diligent pursuit, or retaking of him the said J. M. by the said J. Dole, he the said J. M. voluntarily, and of his own accord, instantly returned within the liberties of the said jail or prison, and within the custody of the said sheriff, on the said *ca. sa.* to wit, &c. and continually, after such return, until the day of the exhibition of the bill of the said James Dole, the said J. M. hath been and continued, and still doth remain and continue, within the liberties of the said jail or prison, for the cause *aforesaid, according to the tenor and effect of [*206] the said writing obligatory; and, the said defendants aver, that the said return of the said J. Moulton into the liberties of the said jail or prison, in manner aforesaid, was prior to any suit or action, or pretence of suit or action, sued, prosecuted or commenced against the said James, for or by reason of any escape, made or pretended to be made, by the said J. M. or for or by reason of his going out of the said liberties, in manner aforesaid, and this they are ready to verify," &c.

On the first and second pleas issue was joined by the plaintiff. To the third plea there was a demurrer and joinder.

Bird and Van Vechten, for the plaintiff.

Woodworth and Spencer, contra.

LANSING, Ch. J. delivered the opinion of the court, to the following effect. Two objections have been taken by the defendants to the validity of the bond; 1. That the penalty is more than double the amount of the bond; 2. That the condition is not conformable to the terms of the act, because it does not contain the words, "that the prisoner shall not, at any time or in any wise, escape or go without the limits of the liberties."

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As to the first objection, it will be seen that the penalty does not exceed double the amount of the execution, including the sheriff's fees for *poundage*. The act directs the bond to be taken in a penalty of double the amount of the sum for which the prisoner is confined. It does not refer to the precise sum in the execution. The poundage is due from the prisoner, as a part of the debt, and must be paid, before he is entitled to a discharge. This appears to be the rule in England, (2 Term Rep. 132,) and is sanctioned by the usage here. But it does not lie in the mouth of the defendants to *make this objection. It is not pretended that a bond in a higher sum has been extorted from them. They must, therefore, be considered as having acquiesced in it, and ought not now to be allowed to avoid it, on that ground.

The second objection is equally untenable. The condition of the bond is, in effect, the same as if it contained all the words of the act; and if it was not, the bond ought not to be invalidated, because it omits to bind the defendants to the full extent which the plaintiff had a right to demand. It is well enough, if it is within the act; and if less extensive, it is a favor to the defendants, of which they have no reason to complain.

Having dismissed these objections, we come to the principal question, the sufficiency of the third plea. The plea admits the liberties to have been prescribed by law, and although they are, in many parts, terminated by imaginary lines, we must conclude that they were designated as to the county court appeared proper, and were sufficient to regulate the sheriff's conduct. The bond, then, being offered to the sheriff, it was his duty, if the sureties were sufficient, to have permitted the defendant, Moulton, to go at large within the liberties. By the supplementary act of the 30th March, 1799, it is declared, that the sheriff may permit prisoners to go at large within the liberties, without any security taken; and when the security is procured and offered, it may be considered as obligatory on the sheriff, to give the prisoner who offers it, the use of the liberties of the jail. He has no other

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than a reasonable discretion to exercise, in regard to the competency of the security, and the fitness of the bond.

In all cases, therefore, where the security is offered, the four walls of the prison, according to the ancient law, are enlarged to the extent of the limits assigned, by the statute; and the law concerning escapes must, without doubt, apply to the limits, in the same manner as "it formerly [208] applied to the four walls of the prison. (2 Term Rep. 131.) So that the limits are to be considered, in such case, as the prison.

The bond, in this case, is for the *indemnity* of the sheriff only. Notwithstanding its form, or the terms in which it is expressed, this would result from the construction of the act of the 5th April, 1798, (11 sess. c. 91,) without the declaratory act of the 30th March, 1799, (11 sess. c. 65,) which is retrospective, and affects pre-existing, as well as subsequent bonds. Viewing it as a bond of indemnity, merely, it must appear, that the sheriff has been *damnified*, in order to maintain this action.

An escape without the knowledge of the sheriff, and a voluntary return without his knowledge, before suit brought, is tantamount to a retaking on a fresh pursuit. (Com. Rep. 554. 2 Term Rep. 129.)

Here the prisoner immediately returned within the limits. His going beyond them cannot be considered as a voluntary escape on the part of the sheriff. He was authorized by law to take the bond, and indulge the prisoner with the privilege of the liberties. It was a legal act which cannot be imputed to him as a fault, nor can it justify the inference, that he consented to the escape. It is, therefore, to be considered as a voluntary escape only, and the return of the prisoner before action brought, saves the condition of the bond, and is a competent defence on the part of the sheriff.

Here, then, is a case, in which the sheriff cannot sustain any damage from the escape, and the question results, whether he is entitled to recover on this bond. As the sheriff has not, and cannot be *damnified* by the alleged escape, it would be absurd to say, that the plea was not valid, when it

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discloses matter sufficient to show that the plaintiff sustained no injury.

In bonds for the performance of covenants and for indemnity, the penalty is not recoverable. Courts of law [*209] are invested with an equitable jurisdiction on the subject; and the true question in courts of law, as well as in courts of equity, is now a question of damage. *Quantum damnificatus*, is the true point in issue, in all such cases; and *non damnificatus*, must be a good plea to all indemnifying bonds. The plea in the present case is substantially such a plea.

We are, therefore, of opinion, that the defendant is entitled to judgment.

BENSON, J. and RADCLIFF, J. though they concurred in the judgment of the court, declined giving any opinion, whether the sheriff was bound to grant the privilege of the liberties of the prison, on tender of a bond, without sufficient sureties, as the decision of that point was not necessary in the determination of the question, as to the validity of the plea.

LEWIS, J. was absent.

Judgment for the defendant.(a)(b)

 EXECUTORS OF MAHANY *against* FULLER.

Where executors sued in this court, and recovered less than fifty dollars, it was held, that they were not entitled to recover costs, nor liable to pay costs to the defendant.

THIS was an action of *assumpsit*. The defendant pleaded *non assumpsit*, and payment, with a notice of set-off. The cause was referred, by consent, and the referees report-

(a) See note (a) to *Lansing v. Fleet*, *supra*, p. 4.

(b) [Old note.] See *Tillman v. Lansing*, 4 Johns. R. 2d ed. 45, and references. *Bissel v. Kip*, 5 Johns. R. 2d ed. 89, and references. *Stone v. Woods*, 5 Johns. R. 2d ed. 182, and references. *Peters and Gedney v. Henry*, 6 Johns. R. 2d ed. 121, and references.

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ed a balance in favor of the plaintiffs, for eight dollars and forty cents.

Van Vechten, for the plaintiffs, now moved for full costs.

Graham, contra.

*LANSING, Ch. J. delivered the opinion of the [*210] court. The statute, (10 sess. c. 72,) which was expressly enacted to restrain parties from bringing suits in this court, for the recovery of less than the sum of two hundred and fifty dollars, limits the plaintiff's right to costs to the recovery of fifty dollars. In case he recovers more than fifty dollars, but less than two hundred and fifty dollars, he is then entitled to such costs only as are taxed in the courts of common pleas; and if less than fifty dollars is recovered, the defendant becomes entitled to costs against the plaintiff, as in the case of a verdict in his favor.

The plaintiffs in the present case prosecute as executors, and cannot be affected by the provision of the act which subjects plaintiffs, who recover less than fifty dollars to the payment of costs; for if such were to be the construction of the act, it would involve the inconsistency of subjecting executors, who were plaintiffs, to the payment of costs, if they sustained their suit, and recovered less than fifty dollars, and wholly exempting them from costs, in case of a total failure in their suit.

The preamble to the statute shows the intent of the legislature. It recites, that there are courts of record in the several counties, in which suitors may obtain justice, at a less expense, than in this court, and for that reason, imposes the restraints on suits, for small sums, in the supreme court.

This court has decided that executors, plaintiffs, who recover less than twenty-five dollars, in the courts of common pleas, are, nevertheless, entitled to costs. That decision was founded on the consideration, that the *ten pound* act did not extend to cases of executors, and that consequently, the statutes, relative to costs, which gave costs to plaintiffs who recovered damages, applied.

The plea of set-off does not vary the case, for the statute puts it expressly on the recovery. As the plaintiffs would not

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have been liable to pay costs, in case a verdict had [*211] been found for the defendant, neither ought *they to recover costs. The act ought not to be construed so as to deprive executors of the benefit of their general exemption from costs. The motion must be denied.

Motion denied.(a)

 TITFORD *against* KNOTT.

The hand-writing of the maker or endorser of a note may be proved by witnesses from their previous knowledge of his hand-writing, derived from having seen the person write, or from authentic papers, received in the course of business; but if the witness has no previous knowledge of the hand-writing, he cannot be permitted to decide upon it, in court, from a comparison of hands.

Whether papers signed by the party, admitted to be genuine, can be delivered to a jury, to determine, by a comparison, as to the genuineness of the paper in question? *Quere.*

The confidential clerk of the plaintiff, was admitted, to prove a correspondence by letters, between the plaintiff and defendant, who resided in London, and to testify, that from the knowledge that he had acquired from the letters of the defendant, received during this correspondence, he believed the endorsement in question, to be the hand-writing of the defendant, though the witness had never seen the defendant write.

THIS was an action on the case, brought by the plaintiff, as the endorsee of a promissory note, against the defendant, as the maker, and was tried at a circuit court, held in the city of New York, on the 9th day of April, 1800, before Mr. Ch. J. LANSING.

The plaintiff called John Goodeve, as a witness, who said that he had known the defendant for several years, but was not well acquainted with his hand-writing; that he had been bail for the defendant to the sheriff, in this action, and upon that occasion, he believed he had seen the defendant sign his name to the bail bond which was produced by the plaintiff's

(a) As to costs against executors and administrators in suits brought by them, see Grah. Prac. 2d ed. 737, and references.

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counsel. The witness said that the bail bond produced was the same that had been signed by him; that he did not know that he had seen the defendant write, but he supposed he must have seen him write his name when he executed the bail bond; that he was possessed of several pieces of writing, which he believed to be the hand-writing of the defendant, which he had received from him, in the course of his business, and one of which he produced. It purported to be an *order for candles, and was signed with the [*212] defendant's name. The witness said he believed this to be the defendant's hand-writing, but that he had not seen him write it; that the candles had been delivered according to the order, but that he did not know that they had been paid for; that the defendant had not acknowledged to him, that he had sent him such an order. Being asked whether he believed the signature to the note to be the hand-writing of the defendant, he answered, that he could not determine, except from the writings before him; and that in his opinion, there was a similarity between them.

To prove the endorsement, the plaintiff called Robert Bach, who said that he had formerly been the plaintiff's confidential clerk; that the plaintiff and the endorser (who resided in London) had long been correspondents; that in the course of the plaintiff's business, the plaintiff had received several letters from the endorser, which, of course, came to the hands of the witness; that he had never seen the endorser write, but that from his knowledge of the endorser's hand-writing, acquired as above mentioned, he believed the signature endorsed, to be the hand-writing of the endorser; that the note in question, with the endorsement thereon, was received by the plaintiff, in a letter (directed to the plaintiff) from the endorser; which letter, the witness himself had received, and opened. The note was dated at London, the 2d day of April, 1792. It was proved by all the witnesses, that the defendant was an Englishman, and had arrived at New York about five or six years ago.

William Wayman, who was produced, as witness, on the part of the defendant, declared that he had known the de-

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fendant about eight or nine years ; had seen him write several times, and had dealings with him ; that he sometimes signed T. and other times "Thomas;" he believed himself to be competent to judge of the hand-writing of the defendant ; that he did not believe the signature to the [213] note, was the hand-writing of the defendant. Upon his cross-examination, he said he had seen the defendant write three times.

John Cunningham, another witness for the defendant, testified that he had known the defendant about five years, had been in habits of intimacy and business with him, and had seen him write frequently, and believed himself able to judge of the hand-writing of the defendant ; and that he did not believe the signature to be the hand-writing of the defendant:

It was objected, by the counsel for the defendant, that testimony from the comparison of hands was improper, and inadmissible ; that the evidence on the part of the plaintiff was insufficient to maintain his action, and that therefore, he ought to be nonsuited. The judge, however, ruled, that evidence from the comparison of hands was proper, and permitted the counsel for the plaintiff to show to the jury papers signed by the defendant, and from them to judge of the similarity to the note.

The defendant's counsel then produced fifteen or eighteen notes of hand, some of which it was admitted, were written wholly by the defendant, others of them, only signed or endorsed by him ; and with the consent of the plaintiff's counsel, delivered them to the jury, under an agreement, that the jury should take the notes so delivered to them, the bail bond, and order, and also the note in question with them out of court ; and should from all the evidence, so produced and delivered to them, make up their verdict.

The judge left it generally to the jury, to determine from all the circumstances, whether the signature on the note, was the signature of the defendant, with directions that if they were convinced it was so, they should find for the plaintiff.

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The jury found a verdict for the plaintiff.

A motion was made to set aside the verdict, which was argued by *Munro*, for the plaintiff, and *Troup*, for the defendant, who cited *Stranger v. Searle*, (1 Esp. Rep.

*14.) *Goodlittle v. Braham*, (4 Term Rep. 497,) [*214] and *Macfereson v. Thoytes*, (Peake's Rep. 28.)

KENT, J. delivered the opinion of the court. The question, in this case, is as to the competency of the proof of the hand-writing of the defendant; and we are of opinion it was admissible. It is usual for witnesses to prove hand-writing, from previous knowledge of the hand, derived from having seen the person write, or from authentic papers, received in the course of business.^(a) (Peake's N. P. 21. 1 Esp. Cases, 15, 351, 352.) If the witness has no previous knowledge of the

(a) *The State v. Allen*, 1 Hawks' R. 6. *Lyon v. Lyman*, 9 Conn. R. 55, 59, 60. *Carey v. Pitt*, Peake's add. Cas. 130. *Russell v. Coffin*, 8 Pick. R. 143. *Hammond's case*, 2 Greenl. R. 33. *Redford's adm'r. v. Peggy*, 6 Rand. 316. *Turnipseed v. Hawkins*, 1 McCord, 278, 279. *Faber v. Hilliard*, 2 N. Hamp. R. 480, 481, 482. *Clark v. Wallace*, 3 Penna. R. 441. *Thatcher v. Goff*, 11 Lou. R. (Curry,) 94.

"Hand-writing is well proved by a witness who has received letters from the party, in answer to letters written to him by the witness, though the witness has never done anything in consequence of the receipt of such letters. *Dee v. Wallinger*, cor. Holroyd, J. *Dorchester Spring Amizes*, 1819, 2 Stark. Ev. 273, n. (h.) 6th Amer. ed. If letters are sent directed to a person on particular business, and an answer is received in due course, a fair inference arises that the answer was sent by the person in whose hand-writing it purports to be. Per Lord Kenyon in *Carey v. Pitt*, Peake's add. Cas. 130. The like general doctrine prevails where the witness, though he has seen no written correspondence of the party, is able to testify from other authentic papers, received or examined by him in the course of business; per Kent, J. in *Titford v. Knott*, 2 Johns. Cas. 214; *Turnipseed v. Hawkins*, 1 McCord, 278; *Faber v. Hilliard*, 2 N. Hamp. R. 481, 482; *Thatcher v. Goff*, 11 Lou. R. (Curry,) 94; e. g. notes purporting to have been signed by the alleged writer, and afterwards paid by him; the payment of them being a full admission that he had made and signed them. *Johnson v. Daverna*, 19 Johns. 134, 136. So, where the witness, an officer of a bank, stated that he knew the person's hand-writing, from the circumstance of having his bank-book, and having seen his checks, which were received and paid in the ordinary course of business. *Coffee's case*, 4 City Hall Rec. 52; S. C. *Judic Repos.* 293. In Virginia, a witness who had acquired a knowledge of the hand-writing of a person, from an examination of his papers after his death, (the witness being his administrator,) was held competent to testify to his

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hand, he cannot then be permitted to decide it, in court, from a comparison of hands. (1 Esp. Cas. 14.)(b)

hand-writing, in the court of probate, though the witness professed to have no knowledge save that so derived. *Sharp v. Sharp*, 2 Leigh, 249. In *Smith v. Sainsbury*, 5 Carr. & Payne, 196, it became necessary for the defendant to prove the hand-writing of Mary Smith, an attesting witness to an agreement, purporting to be signed by the plaintiff. The defendant's attorney for this purpose testified, that he believed he was acquainted with her hand-writing; that he had never seen her write, but had observed the name of Mary Smith signed to an affidavit, which had been used by the plaintiff's counsel, in answer to an application to postpone the cause, and which was filed. In the affidavit it was sworn, that Mary Smith was the plaintiff's wife. This evidence being objected to, Park, J. held it sufficient; for, the plaintiff was precluded from alleging that the signature to the affidavit was not genuine. He distinguished it from the case of mere comparison of hand-writing, inasmuch as the witness took notice of the signature, and, in his mind, formed an opinion, which enabled him to swear to his belief." Cowen & Hill's Notes to 1 Phil. Ev. 1324, 1325.

(b) "Mr. Starkie, speaking as to the rule excluding mere comparison of hands, says, that perhaps after all, the most satisfactory reason for it is, that if such comparison were allowed, it would open the door to the admission of a great deal of collateral evidence, which might go to a very inconvenient length. For, in every case, it would be necessary to go into distinct evidence, to prove each specimen produced to be genuine; and even in support of a particular specimen, (if the present rule were to be broken through,) evidence of comparison would be receivable in order to establish the specimen, and so the evidence might branch out to an indefinite extent. 2 Stark. Ev. 375, 6th Am. ed.

"By comparison, is now meant, an actual comparison of two writings with each other, in order to ascertain whether both were written by the same person; though formerly, even comparing the standard formed in the witness' mind with the writing in dispute, was called evidence by comparison: and hence, was deemed inadmissible, at least in criminal cases. 2 Stark. Ev. 373, 374, 6th Am. ed.

"The English courts have consistently followed the rule, excluding evidence founded upon a mere comparison of hands by witnesses. See an elaborate note, exhibiting most of the earlier English cases, 4 Esp. Rep. 273, a, Day's ed. A witness cannot have two writings placed in his hands, and then be asked, whether, in his belief, both were not written by the same person. *Clermont v. Tullidge*, 4 Carr. & Payne, 1. See also *Mitchinson v. Allcock*, 1 Dowl. & Ryl. 165; *Greaves v. Hunter*, 2 Carr. & Payne, 477. On information for a riot, a letter from the prosecutor was offered by the defendant, and admitted to be genuine. Then a lost letter was proposed to be proved by a witness, who never saw the prosecutor write, but would swear it was in the same hand with the letter produced; this was rejected because he had never

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To repel this proof, the defendant produced two witnesses, who severally swore, that they were acquainted with his hand-writing, and that the note in question was not signed with his hand. The defendants, also, produced several notes, admitted to be his, for the jury to judge, by comparison, and they were delivered to the judge, *by consent*. This consent takes away all objection to the admissibility of the notes, and we, therefore, decline giving any opinion, as to the legality of such testimony, without consent.

The plaintiff then proved the endorsement to the note by a confidential clerk, who testified, that the plaintiff and endorser (who resided in London) had long been correspondents, and that their letters came into his hands; and although he had never seen the endorser write, he believed the endorsement to be his hand, from the knowledge he had acquired from the correspondence.

This proof was undoubtedly admissible and competent; (Buller's N. P. 236;) and there is no sufficient cause shown for disturbing the verdict.

Rule refused.(c)

seen the party write. *The King v. Sir T. Culpepper*, Skin. 673." Cowen & Hill's Notes to 1 Phil. Ev. 1326.

"The doctrine excluding comparison of hands by witnesses, was recognized by the Supreme Court of the United States, in *Strother v. Lucas*, 7 Peters' R. 763. 'It is a general rule,' said Thompson, C. J., delivering the opinion in that case, 'that evidence by comparison of hands is not admissible, where the witness has had no previous knowledge of the hand-writing, but is called upon to testify merely from a comparison of hands.' Id. 767." The same doctrine has been recognized in New York, *Jackson ex dem. Van Duzen v. Van Duzen*, 5 Johns. R. 155. See *Jackson ex dem. Woodruff v. Cody*, 9 Cowen, 140; *Haskins v. Stuyvesant*, Auth. N. P. 97; *Jackson v. Phillips*, 9 Cowen, 94; *Wilson v. Kirkland*, 5 Hill, 182; *Olmstead v. Stewart*, 13 Johns. R. 238. New Jersey, *Goldsmith v. Bane*, 3 Halst. 87. Virginia, *Rowe's adm'r. v. Kile's adm'r.* 1 Leigh, 216. See *Gardner's adm'r. v. Vidal*, 6 Rand. 106; *Redford's adm'r. v. Peggy*, id. 316; *Sharp v. Sharp*, 2 Leigh, 249; and Kentucky, *Woodward v. Spiller*, 1 Dana R. 179, 181. The whole subject is elaborately considered in Cowen & Hill's Notes to 1 Phill. Ev. 1324-1332, and all the principal cases are cited and commented on.

(c) See Peake's Law of Ev. 2d ed. 103, 107.

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[*215] *FISH *against* WEATHERWAX.

Where a verdict is found for the plaintiff, and the judgment of the court below is *arrested*, and the plaintiff wishes to bring a writ of error, the proper course is for the plaintiff to move the court for judgment against himself, and for the defendant, for the insufficiency of the declaration, on which judgment a writ of error will lie, but not on an *arrest* of judgment.

If the court below refuses to give such judgment, on the prayer of the party, this court will grant a *mandamus* to compel them to give judgment.

Foot, for the plaintiff, moved for a rule on the judges of the court of common pleas of the county of Rensselaer, to show cause why a *mandamus* should not issue, to compel them to give judgment in this cause. It appeared that a verdict had been found for the plaintiff, and that the common pleas had arrested the judgment for the insufficiency of the declaration.

Foot said, that a writ of error could not lie, and that a *mandamus* was the only remedy. He cited 1 Salk. 144; Cowp. 377; 3 Burr. 1265; Stra. 113, 530.

Bird, contra.

BENSON, J. delivered the opinion of the court. There may be a judgment, for the insufficiency of the declaration or plea, as the case may be, against the party, though there may be a verdict for him. If the party for whom a verdict is found, will not move for judgment, the other party may pray for judgment against himself; but the entry on the record will still be as if the judgment had been on the prayer of the party for whom the judgment was found. And where a party prays to have judgment rendered against him, to the intent, that he may bring a writ of error, he is entitled to have it so rendered against him, as matter of right.

Where the verdict is for the plaintiff, if the defendant, instead of letting the plaintiff take a judgment for himself, prays only that the court, omitting to render judgment, shall, as their final act in the cause, say to the parties, that they may go without any further day given to them to appear

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again ; and if the plaintiff, when the court have declared their opinion against him, does not pray judgment against himself, the judgment, *in such case, is said [*216] to be *arrested*, as distinguished from the case where it is rendered ; for, according to the ordinary, though, perhaps, improper sense of the expression, a judgment is said to be *arrested*, when the court, by an interlocutory act, award a new trial, or repleader, or other further proceedings ; and where the party for whom the verdict was given, must still so further proceed, until there shall finally be a judgment in the cause, and then, on a writ of error, he may have judgment on the verdict, if entitled to it, and the judgment of the court, in awarding the further proceedings, and of consequence the proceedings themselves, be reversed. The arresting of judgment, however, in the present case, is the final act of the court ; and the question is, whether it is such a judgment, as that a writ of error will lie upon it.

In some cases, where a judgment is rendered against the plaintiff, it will be a bar to an another action for the same cause, and his only remedy is, by a writ of error, to have the judgment reversed ; but if the remedy, where the judgment is *arrested*, is also by writ of error, then the law, to be consistent with itself, must make an arrest of judgment a bar to a new action, in the same cases where the rendering of judgment is a bar. But as the *arrest* of judgment is not, by law, a bar in any case, the inference must be, that a writ of error will not lie on it.

That this is the law, is further evident, from the form of the entry where the judgment is arrested, and the form of the court of errors. In the first case the entry is, "omitting the rendering of judgment," &c. in the latter case, the writ of error states, "that in rendering judgment, manifest error," &c.

If, then, the plaintiff has no remedy by a writ of error, he must have it by a writ of *mandamus* ; though, strictly speaking, he is not entitled to his rule, before he has prayed the court below to render judgment against *him- [*217] self, for until then there is no default in the judge of the inferior court ; yet as this case is new, and to prevent

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delay, the court will grant a special rule, that if the judges of the court below shall refuse, on the prayer of the plaintiff, to render judgment against himself, and for the defendant, that then they show cause by the first day of the next term, why a *mandamus* should not issue to them to proceed to judgment in the cause. (a) (Lutw. 124, 166, 1052, 1419, 1498, 1608. 2 Barnes, 206, 226. Plowd. 209. 2 Saund. 228. 2 Town. Jud. 118, 155. 5 Co. 32. 1 Mod. 207.)

Rule granted accordingly. (b)

(a) See *infra* note (b), §

(b) The editor trusts that he will be excused in submitting to the profession a collection of cases upon the law of *mandamus*, broader and fuller than is required to elucidate the decision in the principal case. In the progress of legal science almost every branch of jurisprudence has become the subject of a distinct *modern* treatise, and it is somewhat singular therefore that this should have been neglected, since the Courts and the Bar are daily occupied in its consideration. The intention of the editor has been, in some degree, to supply the neglect of others, though it might not be done with any thing like that completeness which is desirable, and the result is submitted to the use and to the judgment of the profession.

§ 1. In the administration of political affairs and in the proper government of subordinate officers and tribunals, it is necessary that some power should exist to compel them to those acts which public justice demands. And whatever may be the wisdom with which specific remedies, the instruments of that power, are devised, many cases must arise to which they cannot be applied, and in which "a failure of justice and defect of police" must be the consequence. The necessity therefore has become apparent of establishing some general residuary remedy to be used upon all occasions where the law has bestowed no other, and where in justice there ought to be one. (See per Lord Mansfield in *Rex v. Baker*, 3 Burr. 1274.) This remedy is called the Writ of *Mandamus* and it is liberally interposed for the benefit of the citizen and the advancement of justice; "the value of the matter or the degree of its importance to the public police is not scrupulously weighed; if there be a right and no other specific remedy, it will not be denied: in fact, where there is a right to execute an office, perform a service, or exercise a franchise, more especially if it be a matter of public concern, or attended with profit, and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, the court will interpose by *mandamus* upon reasons of justice as the writ expresses—*Nos A. B. debitam et festinam justitiam in hac parte fieri volentes, ut est justum*; and upon reasons of public policy, to preserve peace, order, and good government." (*Rex v. Baker*, 3 Burr. 1267. Per Lord Mansfield, *ibid.* 1266.) By means of this suppletory remedy inferior officers and tribunals are forced to perform their duties, and corporations are

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compelled to observe the ordinances of their constitution and the rights of those entitled to participate in their privileges. (See Angel & Ames on Corp. ed. 1832, p. 426) The proceeding by mandamus was employed early in the annals of English jurisprudence, but it would be impossible to determine the date of its origin even if there were any object to be gained by so useless a pursuit. Indeed this has been the subject of considerable difference of opinion amongst legal antiquarians which it would be utterly idle at this day to attempt to solve. Let it suffice to observe that while on the one hand it has been supposed to be of modern existence and to owe its origin to Bagge's case, on the other it has been traced back to the time of Edward III. and even earlier, to that of Edward I. (See Bac. Ab. tit. Mandamus A.; Lev. 23; Show. 263; Ca. Law & Eq. 53, 57; Palm. 51; Dyer, 333; Skinner, 293, pl. 3, 310, pl. 4. See also per Lord Mansfield in *Rex v. Askew et al.* 4 Burr. 2186, 2189.) But whatever may be the antiquity of this remedy, it is clear that its application upon distinct and well settled principles is, comparatively speaking, of late date. In the more ancient cases the grounds upon which a mandamus was granted or refused were not explicitly stated, but within the last century it has been liberally interposed for the benefit of the citizen and the advancement of justice. (Bac. Ab. Bouvier's ed. tit. Mandamus, introd. 3 Burr. 1267; 4 id. 2188; Cowp. 378.)

§ 2. No definition of mandamus has been given which is on the whole, more satisfactory than that of Sir William Blackstone. It substantially describes this writ as in general, a command issuing in the name of the sovereign authority from a superior court and directed to any person, corporation or inferior court of judicature, within the jurisdiction of such superior court, requiring them to do some particular thing therein specified which appertains to their office and duty. (3 Black. Comm. 110. See Bouvier's Law Dict. tit. Mandamus.)

§ 3. Let us now briefly consider where the authority to issue a mandamus is reposed. By the common law this writ was esteemed one of the flowers of the King's Bench, (per Doddridge, J. in *Audley v. Jay*, Poph. 176,) and peculiar to that tribunal, because of the general superintendence which it exercised over all inferior jurisdictions and persons. The king originally sat there in person and aided in the administration of the law. According to the theory of the English constitution the king is the fountain of justice, and where the laws did not afford a remedy and enable the individual to obtain his right, by the regular forms of judicial proceedings, the prerogative powers of the sovereign were brought in aid of the ordinary judicial powers of the court, and the mandamus was issued in his name to enforce the execution of the law. And although the sovereign has long since ceased to sit there, yet he is still present in construction of law so far as to enable the court to exercise its prerogative powers in his name; and hence its power to issue the writ of mandamus. It is therefore, evident, that by the principles of the common law, this power would not be incident to any court which did not possess the general superintending power of the Court of King's Bench, (*sed vid.* Vern. 175,) in

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which the sovereignty might by construction of law be supposed to sit, and to exert there its prerogative powers in aid of the court in order that a right might not be without a remedy. (Per Taney, Ch. J. in *Kendall v. The United States*, 12 Peters, 524, 630.) It may therefore be stated, as a general principle, that all those courts which bear the same judicial relation to the sovereign power of the state that the King's Bench does in England, have the authority to issue the writ of mandamus. In every well constituted government the highest judicial authority must necessarily have this supervisory capacity to compel inferior or subordinate tribunals, magistrates, and all others exercising public powers, to perform their duty. (*Strong, petitioner*, 20 Pick. R. 484, 495. *Howard v. Gage*, 6 Mass. R. 462, 463. 1 Grah. Pr. 3d ed. 315. *State v. Bruce*, 1 Const. Rep. S. Ca. 165, 174, 175. See *Commw. v. Commissioners of Lancaster*, 6 Binney, 5; *Commw. v. Judges of Common Pleas*, 3 Binney, 273; *The Same v. The Same*, 1 Serg. & Rawle, 187; *Morris v. Buckley*, 8 id. 211; *Kolb's case*, 4 Watts, 154; see also 9 Serg. & Rawle, 72, per Tilghman, C. J.)* The judiciary act of 1789, (§ 13,) express-

* By the Revised Statutes of New York, (vol. 2, 3d ed. p. 259, § 1,) "the supreme court shall possess the powers, and exercise the jurisdiction, which belonged to the supreme court of the colony of New York, with the exceptions, limitations and additions, created and imposed by the constitution and laws of this state." The jurisdiction of this court as it now exists, is traced to the ordinances of 1699 and 1704; by the latter of which, it is invested with full and ample power and authority to have and take cognizance of all pleas and causes, civil, criminal and mixed, and to hear, try and determine the same, as fully and absolutely to all intents and purposes, as the courts of king's bench, common pleas, and exchequer in England. (1 Grah. Prac. 3d ed. p. 304.) The provision of the constitution of 1846, (art. vi. § 3,) that there shall be a supreme court, having general jurisdiction in law and equity, in no respect changes the power of that tribunal to grant the writ of mandamus.

The Revised Statutes of Massachusetts (499, § 5,) provide that the justices of the supreme judicial court "shall have power to issue writs of error, certiorari, mandamus, prohibition and quo warranto, and all other writs and processes, to courts of inferior jurisdiction, to corporations and individuals, that shall be necessary to the furtherance of justice, and the regular execution of the laws."

The provision in the Statutes of Maine is very similar. It is that the supreme judicial court "shall have power to issue writs of error, certiorari, mandamus, prohibition, quo warranto, and all other processes and writs, to courts of inferior jurisdiction to corporations and individuals, which may be necessary for the furtherance of justice, and the due execution of the laws." (Rev. Stat. of Maine, 395, § 5.)

The Constitution of Missouri, of 1820, (art. v. § 3,) provides that "the supreme court shall have a general superintending control over all inferior courts of law. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, and other original remedial writs; and to hear and determine the same."

The Revised Statutes of Michigan enact that the supreme court "shall have authority to issue writs of error, certiorari, mandamus, habeas corpus, procedendo, supersedeas, and all other writs and process which may be necessary for the due execution of the law, the administration of right and justice, and the full and perfect exercise of its jurisdiction, and to have and determine thereon, according to the principles and usages of law." (R. S. of Mich. 358.)

In Ohio, the Act of February 7, 1831, gives to the supreme court power

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ly conferred upon the Supreme Court of the United States, to issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States, but no similar provision was adopted in reference to the Circuit Courts. It might have been questionable, perhaps, had not this power been explicitly bestowed by statute, whether the former court would have been entitled to exercise it in those cases where it has only appellate jurisdiction, because a mandamus is an original and not an appellate process; (*Daniel v. County Court*, 1 Bibb. 496; *Morgan v. Register*, Hardin, 609; *Daniel v. Warren County Court*, Hardin, 610, n.; *Commw. v. Commissioners of Lancaster*, 6 Binney, 5;) but the latter court has original cognizance concurrent with the courts of the several states of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds \$500 and the United States are plaintiffs or petitioners; or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state. They have also jurisdiction in all cases in law or equity arising under the revenue laws of the United States, for which other provisions are not already made by law. (Acts of 24th Sept. 1789, § 11; id. 2d March, 1833, § 2.) Incidentally to this jurisdiction they have received power to issue all writs necessary for its exercise and agreeable to the principles and usages of law, (Act of 1789, § 14,) and in this general power the writ of mandamus is included. But when this writ is not necessary to the exercise of their jurisdiction it is forbidden, because the reason fails upon which the power to issue it depends. (*McIntire v. Wood*, 7 Cranch, 504. *McCluny v. Silliman*, 6 Wheaton, 349. *Smith v. Jackson*, Paine C. C. R. 453.)

It is obvious from the fact that the governments of the United States and those of the several states are distinct, that the one can exercise no authority

"to issue writs of habeas corpus cum causa, certiorari, mandamus, prohibition, procedendo, error, supersedeas, habeas corpus, ne exeat, and all other writs not specially provided for by statute, which may be necessary to enforce the due administration of right and justice throughout the state, and for the exercise of its jurisdiction, agreeably to the usages and principles of law."

In Pennsylvania the supreme court has the power to grant mandamus. The Stat. of 16th June, 1836, provides that "besides the powers hitherto possessed by the supreme court, to issue writs of mandamus, the said court shall have power to issue such writs to any other court or tribunal constituted by the authority of the laws of the commonwealth, in all cases where such interposition shall, in the discretion of the said court, be necessary to the advancement and due administration of justice;" and this power is also extended to the courts of common pleas:—"The several courts of common pleas, the president judge being present, shall, within their respective counties, have the like power with the supreme court, to issue writs of mandamus to all officers and magistrates, elected or appointed, in or for the respective county, or in or for any township, district, or place within such county, and to all corporations, being or having their chief place of business within such county. The jurisdiction aforesaid, shall be exercised in the manner, and according to the rules, hitherto observed and practised in the supreme court of this commonwealth, except so far as the same shall be altered by this act." (Act of June 14, 1836.)

See the New Jersey Statute, Elmer's Dig. 320.

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over the inferior tribunals, officers, or persons of the other. And therefore a state court cannot issue a mandamus to an officer of the United States, as a register of the land office, to compel him to perform any act. (*McCluny v. Silliman*, 6 Wheaton, 598, 604.)

§ 4. The writ of mandamus has been termed a *prerogative writ*, because regularly it issues only in cases relating to the public and to the government, (Bac. Ab. tit. Mandamus A.) but perhaps a better reason why it was so called is to be found in the fact that it issued by the special power, pre-eminence, or privilege which the king exercised over and beyond other persons, and above the ordinary course of the common law in right of his regal dignity. (See Jac. Law Dic. tit. Prerogative; 1 Black. Comm. 239; *Rex v. Barker*, 1 Wm. Black. 352.) And inasmuch as this writ was theoretically extended to the subject by the prerogative of the sovereign, in the proper exercise of which he could not be controlled, it was of necessity *discretionary* in its character and liable to be granted or refused as he might see fit. Nor has this theory been changed in its application to the judicial system of our own country, but such discretion resides in those tribunals that issue this writ, in the same manner that it did in the king or the court of King's Bench where he was constructively present. It is true that mandamus has been called a writ of right, (Bac. Ab. tit. Mandamus A. id. intro. id. D.) but this was long since questioned; (per Ashhurst, J. in *Rex v. Commrs. of Excise*, 2 T. R. 381, 385;) and it is now well settled that the writ is discretionary, and that this discretion will not be exercised unless some just or useful purpose may be answered thereby. (*Ex parte Fleming*, 4 Hill, 582, 583, 584. *Van Rensselaer v. Sheriff of Albany*, 1 Cowen, 501, 512. *Corporation v. Paulding*, 4 Martin, N. S. 189. *Rex v. Clear*, 4 Barn. & Cresw. 899. *Rex v. Mayor, &c. of Totness*, 5 Dowl. & Ry. 481. *Rex v. Griffiths*, 5 Barn. & Ald. 731, per Bailey, J.) But although it is discretionary in the court to grant or refuse this remedy, yet this discretion is not merely arbitrary and capricious, but on the contrary is regulated by certain rules and principles of law, (which we shall hereafter consider,) in order that every citizen who can show clearly to the satisfaction of the court that he has such a right as the law ought to protect and vindicate, without any other specific remedy of which he can legally avail himself, may be legally entitled to the aid of this process. (See per Brevard, J. in *The State v. Bruce*, Con. Rep. S. Ca. 165, 176.)

§ 5. We have seen that the courts exercise their discretion in granting this writ, and that it is not from hence to be inferred that this discretion is arbitrary in its character and irrespective of general rules of law, which have been dictated by experience and incorporated into our system of judicature. On the contrary, we shall find that a number of leading principles in regard to the granting of mandamus, have received the sanction of the common law and are therefore uniformly to be regarded. And

I. It may be generally stated that a mandamus is granted only to enforce a *public right* or a *public duty*. (Bac. Ab. tit. Mandamus C. Com. Dig. tit. Mandamus A. 3 Black. Comm. 110. 1 Chitt. Genl. Pr. 789.)

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In the first place, such a right or duty must depend upon the public character of the *person* sought to be commanded. If he be a mere private person owing no peculiar duty to the public, the writ will not lie. Therefore, where a mandamus issued commanding a party who was alleged to have custody of certain books, papers and proceedings, relating to a court of requests, (under a local act, 47 Geo. III. sess. 2, ch. 1,) or to the office of the clerk thereof, to deliver them up to a party who claimed to hold them as having been elected clerk to the court, it was held that the mandamus was bad, as not showing that the detainer was other than by a *private* individual. (*The Queen v. Hopkins et al.* 1 Queen's Bench R. 161.) And again, in the second place, such a right or duty must depend upon the public character of the *act* sought to be enforced. This remedy therefore does not extend to any right or duty simply of a private nature and totally unconnected with any of the purposes of public government. Thus, for example, where an application was made for a rule *nisi* for a mandamus to a private trading corporation, to compel them to permit a transfer to the assignees of a bankrupt of some shares of capital stock which stood in his name, and which had been refused, the court said, "We are not aware of any instances of a mandamus like the present having ever been granted, and if we were to grant this, we should be called upon to interfere in all cases of dispute between the members of private corporations. This company, though carried on under a royal charter, is a mere private partnership. But the writ of mandamus is a high prerogative writ, and is confined to cases of a public nature, the rule therefore must be refused." (*Rex v. The London Assurance Co.* 5 Barn. & Ald. 899; 1 Dowl. & Ry. 510.) And, accordingly, where a mandamus was asked to the Bank of England to compel the directors of that corporation to produce their accounts for the purpose of declaring a dividend of the profits, Abbott, C. J. said, "It is, in effect, an application on the behalf of one of several partners, to compel his co-partners to produce the account of profit and loss, and to divide their profits, if any there be. The examination of the accounts of a trading company may be effectually entered into in the Court of Chancery, but this court is a very unfit tribunal for such a subject. A mere trading corporation differs materially from those which are intrusted with the government of cities and towns, and therefore have important *public* duties to perform. No instance has been cited in which the court has granted a mandamus to a corporation like the present, and I think we ought not now to establish the precedent." And Bayley, J. said, "The court never grant this writ except for *public purposes*, and to compel the performance of *public* duties. This is an application at the instance of one of several partners in a trading company to compel his co-partners to divide their profits; but that is a mere *private* purpose and presents a fit subject for inquiry on the other side of the hall. There is no instance in which the court have granted a mandamus to a trading corporation; and that being so, I think that we should not now grant it for the first time." (*Rex v. Bank of England*, 2 Barn. & Ald. 620.) The language of the court is to the same effect in the *Matter of Morris Shepley et al. v. The Mechanics' Bank*, 10 Johns. R. 485. (See also *Rex v. Bank of Eng-*

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land, Doug. 524; *Van Rennselaer v. Sheriff of Albany*, 1 Cowen, 501, 512; *Anon.* 2 Ld. Raym. 485; *Rex v. Merchant Tailors Co.* 2 Barn. & Ald. 115.)

§ 6. Upon the principle that the act sought to be commanded is not of a public character, a mandamus will be refused to compel an admission to an office or service of a private nature. Clerk to a dean and chapter has been decided to be of this character; "his office being only to enter leases granted, &c., and therefore he hath no more to do with the public than the bailiff of a manor." (Comb. 133.) So has proctor in the spiritual court, (3 Mod. 335; Bac. Ab. tit. Mandamus C.) surgeon to a hospital, (Comb. 41; 7 Mod. 118. S. P.); master of the Lord Mayor's water house, (Vent. 143;) clerk of the Butchers Company, (6 Mod. 18; 2 Ld. Raym. 959, 1004;) and approver of guns to the Gunsmiths Company, (6 Mod. 82; 2 Ld. Raym. 989; Comb. 347; though these cases have been questioned; Bac. Ab. tit. Mandamus C.) The office of vestry clerk has also been adjudged within this rule in *Rex v. Churchwardens of Croyden*, (5 T. R. 713,) where Lord Kenyon remarks, "This office is merely of a private nature; and if a mandamus were to be granted to restore to the office of vestry clerk, I should soon expect to hear of an application for a mandamus to restore to the office of a toll-gate keeper of a turnpike road." (See also *State ex rel Gruber v. Champlin*, *Same v. Hunt et al.* 2 Bailey R. 220; Bac. Ab. tit. Mandamus C. 1.)

§ 7. II. The right or duty in respect of which the remedy by mandamus is sought, must be of a legal character. (See the opinion of Yeates, J. in *Commonw. v. Rosseter*, 2 Binney, 262; *State v. Bruce*, Const. R. S. Ca. 165, 175.) The established rule of law is that there ought, in all cases, to be a specific legal right as well as the want of a specific legal remedy. (Id.) Upon this principle the court of King's Bench refused a motion to direct this writ to Dr. Bettsworth, commanding him to grant administration to Smith of the goods of his deceased son *durante minore etate* of his grandson. And they observed, "When we grant mandamus it is to oblige the judge to do right to the party who sues the writ; but as there is no law which says to whom these administrations during minority shall be granted, there is no law to be put in execution." (*Smith's case*, 2 Strange, 292. See *Rex v. Bettsworth*, id. 956.) And the same court held that this writ would not lie to the Archbishop of Canterbury, to issue his fiat to the proper officer for the admission of a doctor of civil law, a graduate of Cambridge, as an advocate of the court of arches, because no such right or duty exists. (*Rex v. Archbishop of Canterbury*, 8 East, 213.)

§ 8. III. The right or duty must be perfect and not inchoate. (*The People v. The Trustees of Brooklyn*, 1 Wend. 318.)

§ 9. IV. It is a rule of general application (though not without exceptions to which we shall hereafter allude) that where there is any other specific remedy for the party complaining, the writ of mandamus will not lie. If therefore an appeal or writ of error can be brought for the purpose of deciding the question presented upon the application for mandamus, the court will leave the party to that remedy. (Carthew, 16; *Prokurst's case*, Andr.

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177.) And the reason of this is clear, for notwithstanding any opinion expressed upon the mandamus, the case might still be brought before the court upon a writ of error. The effect therefore of this mode of interposition would be to retard decisions upon questions which were not final in the court below, so that the same cause might come many times before the superior court before there would be a final judgment. (Per Marshall, C. J. in *Bank of Columbia v. Sweeny*, cited *infra*. See *Rex v. Lincoln's Inn*, 4 Barn. & Cresw. 855; *Rex v. Street*, 8 Mod. 98; 2 Chitty, 255.) In accordance with this principle, where a district judge had decided that the custody of goods proceeded against after a seizure by the collector of the port of New York, was in the marshal of the district, after process had issued by order of the court against the goods, and a mandamus was asked, of the Supreme Court of the United States, to show that such custody was to continue in the collector of the port, it was denied. Story, J. who delivered the opinion of the court observing, "We are of opinion that this is, in no just sense, a case for a writ of mandamus. This court has authority given to it by the thirteenth section of the judiciary act of 1789, ch. 20, to issue writs of mandamus in cases warranted by the principles and usages of law to any courts appointed under the authority of the United States. The present application is not warranted by any such principles and usages of law. It is neither more nor less than an application for an order to reverse the solemn judgment of the district judge, in a matter clearly within the jurisdiction of the court, and to substitute another in its stead. Now a writ of mandamus is not a proper process to correct an erroneous judgment or decree rendered in an inferior court. That is properly matter which is examinable upon a writ of error or an appeal, (as the case may require,) to the proper appellate tribunal. Neither can this court issue the writ upon the ground that it is necessary for the exercise of its own appellate jurisdiction; for the proper appellate jurisdiction, if any in this case, is direct and immediate to the Circuit Court for the southern district of New York." (*Ex parte Jesse Hoyt*, 13 Peters, 279, 290.) So where a mandamus was moved to be directed to the Circuit Court for the County of Washington, commanding them to strike off a plea which they had permitted the defendant to put in, and to compel him to enter another plea which the plaintiff's counsel deemed the proper plea, under the provisions of an act of the Legislature of Maryland, upon which the proceedings were founded, incorporating the Bank of Columbia, the motion was denied. Chief Justice Marshall remarking, "We think this is not a proper case for a mandamus. It does not differ in principle, from any other case in which the party should plead a defective plea, and the plaintiff should demur to it; in which case, there is no doubt that the revising power of this court could be exercised only by a writ of error." (*The Bank of Columbia v. Sweeny*, 1 Peters, 567, 569.) So where a mandamus to the Circuit Court of the eastern district of Louisiana was moved, the petition stating "that a bill in equity is now pending in the said circuit court, in which the petitioner is plaintiff, against Richard Relf and others, defendants; that it is understood to be the settled determination of the district judge not to suffer chancery practice to prevail in the circuit court; that her right to proceed in her suit has been denied, until she shall cause

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copies of her bill in the French language to be served upon the defendants or some of them, and until she shall file documents, which are not made exhibits in the cause; and then that all further proceedings in the cause shall be in conformity with the existing practice of the court, which existing practice is understood to mean the practice prevailing in the court in civil cases generally, in disregard of the rules established by the Supreme Court to be observed in chancery cases;" the motion was denied the court observing: "That it is the duty of the Circuit Court to proceed in this suit according to the rules prescribed by the Supreme Court for proceedings in equity causes at the February term thereof, A. D. 1822, can admit of no doubt. That the proceedings of the district judge, and the orders made by him in the cause, which are complained of, are not in conformity with those rules, and with chancery practice, can admit of as little doubt. But the question before us is not as to the regularity and propriety of those proceedings, but whether the case before us is one in which a mandamus ought to issue. And we are of opinion that it is not such a case. The district judge is proceeding in the cause, however irregular that proceeding may be deemed; and the appropriate redress, if any, is to be obtained by an appeal after the final decree shall be had in the cause. A writ of mandamus is not the appropriate remedy for any orders which may be made in a cause by a judge in the exercise of his authority, although they may seem to bear harshly or oppressively upon the party. The remedy in such cases must be sought in some other form." (*Ex parte Myra Clark Whitney*, 13 Peters, 404, 407, 408.) In accordance with these principles it has been held that where, on a replevin bond to prosecute a suit in replevin in another state, the plaintiff took judgment for the penalty, nominal damages and costs, and the defendant paid the nominal damages and costs, and applied to a subordinate court for an order that satisfaction be entered, this court refused a mandamus to compel the entry of satisfaction; (*Ex parte Livingston v. Superior Court of New York*, 10 Wend. 545;) and where a court of common pleas gave judgment for damages only, it was held that this remedy would not lie to compel them to give judgment for the costs likewise; (*Jansen v. Davison*, 2 Johns. Cas. 72;) nor will it lie to compel a subordinate court in which an action is pending, to set aside a report of referees on the ground that it is contrary to law; (*The People v. The Superior Court of New York*, 18 Wend. 675;) nor to dismiss an appeal alleged to be improperly entered and sustained; (*Jones v. Allen*, 1 Green, 97;) for in all these cases the party has an adequate remedy by writ of error or some proceeding in that nature. (The principle under consideration is also maintained in *The People v. The Judges of Ulster*, Coleman C. 117; *Ex parte Koon et al.* 1 Denio, 644; *Fuller v. The Oneida Common Pleas*, 21 Wend. 20; *Ex parte Nelson*, 1 Cowen, 417; *Ex parte Boatwick*, id. 143; and in *The State v. Mitchell*, *Ordinary*, Const. Rep. S. C. 703; which was an application for a mandamus to be directed to the defendant, to compel him to grant letters of administration to certain persons, and was denied upon the ground that a remedy by appeal was provided by statute. See also *Chase v. The Blackstone Canal Co.* 10 Pickering, 244; *Gaines et al. v. Relf et al.* 15 Peters, 9, 16; *Warren County Court v. Daniel*, 2 Bibb, 573; *Ex parte*

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Nelson, 1 Cowen, 423. Consult also upon this subject 1 Graham's Prac. 3d ed. 316, *et seq.*

§ 10. It is, however, within the power of an inferior tribunal to prevent a party from availing himself of a writ of error by refusing to give judgment, and in that case the remedy by mandamus may be pursued; for otherwise he would have no redress. (*Ex parte Bostwick*, 1 Cowen, 143, 144.) Thus if a subordinate court set aside a report of referees because it conceives that upon the facts found by the referees, the law is against the plaintiff in whose favor the report is made, and if, after the intimation of such opinion, the court refuse upon the application of the plaintiff to render judgment against him, so that he may bring error, it seems that a mandamus would be ordered requiring the prayer of the plaintiff to be granted. (*The People v. The Superior Court of New York*, 19 Wend. 68; *Rex v. Gray's Inn*, Dougl. 524; *Rex v. Lincoln's Inn*, 4 Barn. & Cresw. 855.)

§ 11. Upon the same general principle if the party aggrieved have a remedy by action to maintain his right, a mandamus will not issue; or if it have been issued it will be quashed. Where, therefore, this writ had been granted, commanding a party who was alleged to have custody of certain books, papers, and proceedings relating to a court of requests, (under a local act, 47 Geo. III. sess. 2, ch. 1,) or to the office of the clerk thereof, to deliver them up to a party who claimed to hold them as having been elected clerk to the court; Patteson, J. objected upon the argument that the party in whose legal custody they had been might maintain trover. (*Regina v. Hopkins et al.* 1 Q. B. 161, 168.) And where an alternative mandamus had been issued to compel the trustees of Brooklyn, to procure the report of commissioners of estimate and assessment, appointed in relation to the opening of Adams Street, to be filed with the clerk of the common pleas of Kings, to the end that the same might be confirmed by the court, or to show cause why, &c., Savage, Ch. J. said: "If the relators have a right to the amount assessed in their favor, by virtue of the assessment alone, then an action lies." (*The People v. The Corporation of Brooklyn*, 1 Wend. 318, 325.) Accordingly where a mandamus was moved to compel the supervisors of the city and county of New York, to audit and allow the salary of an associate judge of the general sessions, it was denied because an adequate remedy by action existed under the statute of May 14th, 1840. (*Ex parte Lynch*, 2 Hill, 45, 47. See also *Ex parte Lynch*, *id.* 46, n. c.) So it was denied where one was moved to the company of an incorporated bank, commanding them to permit certain shares in the capital stock, standing in the name of Kip on the books of the company, to be transferred on the books, Kip having become insolvent and duly assigned all his estate; because when a corporation improperly refuses to transfer stock the party injured has an ample remedy by action. (*Shipley v. The Mechanics Bank*, 10 Johns. 484. *Ex parte The Firemens Ins. Co.* 6 Hill, 243. *Kortright v. Buffalo Commercial Bank*, 20 Wend. 91. 22 *id.* 348, S. C. in error. See also *Rex v. Bank of England*, Dougl. 524; *Rex v. The London Assurance Co.* 5 Barn. & Ald. 899.) And for the same reason

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one moved to compel the clerk of the parish to give the petitioner a certificate of his having become a member of the parish, in order that he might file it with the clerk of the religious society which he wished to leave; (*Oakes, Petitioner, &c. v. Hill*, 8 Pick. 47;) and one to oblige the trustees of an incorporated church to restore the prosecutor to the possession of a pew to which he claimed title, (*Commw. v. Rosseter*, 2 Binney, 360,) were refused. And where a recovery in an action for a tort had been assigned; and the nominal plaintiff had acknowledged satisfaction of record, but the court in which the suit was prosecuted refused to vacate the entry of satisfaction: the S. C. denied a mandamus directing a vacatur; holding that the proper remedy was by action against such plaintiff. (*The People v. Tioga*, C. P. 19 Wend. 73. See generally upon this subject, *People ex rel. Meritt v. Lawrence*, 6 Hill, 244; *The Same ex rel. Hodgkinson v. Stevens*, 5 id. 616, 629; *Ex parte Braudlacht*, 2 id. 367, 369; *Comm. of the Poor of St. Paul's Parish v. Lynch*, 2 McCord, 170; *Rex v. The Free Fishers, &c. of Whitstable*, 7 East, 353; *Rex v. Archbishop of Canterbury*, 8 East, 219; *Rex v. Severn & Wye Company*, 2 Barn. & Ald. 646; *Rex v. Margate Co.* 3 id. 224; *Rex v. Haythorne*, 5 Barn. & Cresw. 422, 429; *Rex v. Stamford Canal Co.* 1 Maule & Selw. 32; *Rex v. Street*, 8 Mod. 98; 2 Chitt. Rep. 255.)

§ 12. A few other cases will now be stated for the purpose of illustrating the broad application of the rule under consideration. "Though a mandamus to admit to an office gives no title, yet it will not be granted, when there is an officer *de facto*, though that officer be in under a peremptory mandamus obtained by collusion, and claim under the same election with the applicant; for the remedy is to try the title of the officer *de facto* on an information in the nature of a *quo warranto*, on which if judgment of ouster go against the defendant, a mandamus may be granted with less inconveniency to the corporation; nor will it be granted to admit to office the candidate therefor, on account of improper votes having been received for one who was declared elected, had accepted the office, and made the requisite declaration." *Angel & Ames on Corp.* 3d ed. 639. A mandamus to a mayor to admit one to the office of recorder was refused because there was a recorder *de facto*, and it was therefore a decisive answer to the application that there was another remedy by an information in the nature of a *quo warranto*, by which the title of the officer in possession could be tried. (*Rex v. Mayor of Colchester*, 2 Term R. 259.) So one was refused to a treasurer of a county to compel him to reimburse constables' money expended by them, for conveying and maintaining rogues and other idle and disorderly persons, under the act of 17 Geo. II. because the quarter sessions had jurisdiction in the matter. (*Rex v. Earle*, 2 Burr. 1197.) So of one to a bishop to compel him to license a curate of an augmented curacy where there was a cross nomination, for the party had a specific legal remedy by *quare impedit*. (*Rex v. Bishop of Chester*, 1 T. R. 396. See *Rex v. Turner*, T. Jones, 215. "If *quare impedit* does lie, mandamus does not." Per Lord Mansfield in *Powell v. Milbank*, id. 399, 401, n. d; which overrules *Clarke v. The Bishop of Sarum*, 2 Str. 1082; Andr. 20, 185, and the cases there cited. See also *Rex v. Marquis of Stafford*, 3 T. R. 646.) Upon this principle, and for the reason that the ecclesiastical tribunals could

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dispose of the subject, a mandamus was refused to try the right to bury in a churchyard in an iron coffin, though this mode was new, peculiar, and perhaps questionable in its propriety. (*Rex v. Coleridge*, 2 Barn. & Ald. 806.) But (in regard to offices) though an office be full, still if *quo warranto* does not lie, a mandamus will be granted upon the principle that the party shall not be without a remedy. (*Rex v. Barker*, 3 Burr. 1265. *Rex v. Colchester*, cited *supra*. *People v. The Corporation of New York*, 3 Johns. Cas. 79. *The People v. Stevens*, 5 Hill, 616. *Commonwealth v. The Commissioners of Philadelphia*, 5 Rawle, 75. Angel & Ames on Corp. 3d ed. 639.)

§ 13. It has been before remarked that the general rule under consideration is not without exceptions. These arise from the nature of the remedy which is required to exclude the application of the writ of mandamus. Such a remedy must be adequate, specific, legal; (per Lee arg. in *Marbury v. Madison*, 1 Cranch, 137, 152; *King v. Bishop of Chester*, 1 T. R. 404, per Buller, J.;) and competent to afford relief to the applicant therefor upon the very subject matter of his application. Therefore it has been said, that though the party have another legal specific remedy, yet if it be obsolete; (per Buller, J. 1 T. R. 404, in *Rex v. The Bishop of Chester*, Bac. Ab. tit. Mandamus, intro.; *The State v. Holliday*, 3 Halst. 205; see however per Nelson, J. 10 Wend. 396. in *The People v. The Mayor of New York*;) or extremely tedious (per Yeates, J. in *Commw. v. Rosseter*, 2 Binney, 262; *sed vide* 10 Wend. 396;) this writ will lie, since in such case it is inadequate to do justice. And upon the same general principle it has been held that neither a remedy by criminal prosecution; (per Abbott, Ch. J. in *Rex v. Severn & Wye Railway Co.* 2 Barn. & Ald. 646; *Rex v. Commissioners of Dean Enclosure*, 2 Maule & Selw. 80, 81; Cases of Mag. 88; *The People v. The Mayor, &c. of New York*, 10 Wend. 393, 396; *The State v. Holliday*, 3 Halst. 205; Bac. Ab. tit. Mandamus, intro.; 1 Chit. Genl. Pr. 791, n. m;) nor by an action on the case for neglect of duty; (*Ex parte Lynch*, 2 Hill, 45; per Bronson, J. in *McCullough v. The Mayor, &c. of Brooklyn*, 23 Wend. 461;) will supersede that by mandamus, since it cannot compel a specific act to be done, and is therefore not equally convenient, beneficial and effectual. (See Bac. Ab. tit. Mandamus C.; 4 Mod. 281; Comb. 244; *Knipe and Edwin*, Ld. Raym. 159, 163, 338, 561, 958, 989, 1004; 10 Mod. 146; 12 Mod. 609, 666; Fitzgib. 123, 194.) Nor will a remedy in equity prevent the granting of a mandamus, though it may and should influence the court in the exercise of the discretion which they possess, in granting the writ under the facts and circumstances of the particular case. (*The People v. The Mayor, &c. of New York*, 10 Wend. 393, 397. *The State v. Holliday*, 3 Halst. 205. Bac. Ab. tit. Mandamus, intro. But see *The King v. The Company of Free Fishers, &c. of Whitstable*, 7 East, 353, per Laurence, J.)

§ 14. V. The right or duty in respect of which the writ of mandamus is prosecuted must be positive and not resting merely in discretion.

It is obvious that this writ can not lie to compel a subordinate officer or tribunal to do an act which he has a discretion to refuse. Nor, where an au-

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thority to *determine* or *give judgment* is lodged in either, can it be employed to direct the particular judgment or determination which shall be pronounced, though, as we shall presently see, it is a competent remedy to oblige such officer or tribunal to pronounce *some judgment* and thus discharge the duty appertaining to his station. (*The People v. Collins*, 19 Wend. 56. *The People v. The Superior Court of the City of New York*, 5 Wend. 114. *Elkins v. Athearn*, 2 Denio, 192. *Ex parte Koon*, 1 Denio, 644. *Ex parte Wilson*, 1 Cowen, 417. *The People v. The President and Trustees of Brooklyn*, 1 Wend. 318. *Hull v. The Supervisors of Oneida*, 19 Johns. 259. *Ex parte Benson*, 7 Cowen, 363. *In the matter of Gilbert*, 3 Cowen, 59. *Ex parte Coster*, 7 Cowen, 523. *The People v. The Columbia Common Pleas*, 1 Wend. 297. *Ex parte Bacon*, 6 Cowen, 392. *Ex parte Bailey*, 2 Cowen, 479. *Ex parte Chamberlain*, 4 Cowen, 49. *The People v. The Superior Court*, &c. 10 Wend. 285. *Ex parte Brown*, 5 Cowen, 31. *The People v. The Supervisors of Albany*, 12 Johns. 414. *Grier v. Shackelford*, 2 Tr. Con. Rep. 642. *Comms. of Poor*, &c. *ata. Lynch*, 2 McCord, 170. *State v. Gruber*, 2 Bailey, 20. *Griffith v. Cochran*, 5 Binney, 87, 103. *Commw. v. Judges of Comm. Pleas*, 3 Binney, 275. *Commw. v. Cochran*, 6 Binney, 456. *Commw. v. The County Comms.*, &c. 5 Binney, 536. *Commw. v. The Judges of the Common Pleas*, 1 Serg. & Rawle, 187. *Commw. v. Cochran*, 1 Serg. & Rawle, 473. *Wells v. Starkhouse*, 2 Harrison, 355. *Blanchard's case*, 3 Green, 22. *Vanderveer v. Conover*, 1 Harrison, 271. *Roberts v. Holsworth*, 5 Halst. 57. *Squire v. Gale*, 1 Halst. 157. *Chase v. The Blackstone Canal*, 10 Pick. 244. *Gray v. Bridge* 11 Pick. 189. *Morse, petitioner*, 18 Pick. 443. See also *Truedell v. Wheeler*, 2 Aiken, 369; *Frisbie v. Justices*, 2 Vir. Cas. 92.)

What is meant by the *discretion of inferior officers or tribunals*, will be best ascertained by adverting to a few of the cases in which that language has been used. In the case of *The People, ex rel. Wilson v. The Supervisors of Albany*, (12 Johns. 414,) the relator Wilson was a constable, and in that character had removed certain paupers from the city of Albany to the adjoining towns; for which services he presented an account of \$102 to the supervisors. They examined the account, and allowed \$28 thereof, and disallowed the rest, on the ground that it was extravagant and unreasonable. The court refused an application for a mandamus to the supervisors, on the ground that the constable had no legal right to any particular sum, the act under which the services were performed having declared that he should be paid such sum as the supervisors of the county *should judge reasonable*; and it was asked, if a mandamus should be granted, what would be its command? certainly not to allow any specific sum; that would be assuming a discretion which the legislature had vested in the supervisors. The superior tribunal could only command them to examine the account, and, in the language of the statute, allow such sum as they should judge reasonable. In *Giles' Case*, (2 Strange, 881,) a mandamus was asked to certain justices to grant him a license to keep an ale-house. The court refused it on the ground that the justices had a discretion to grant or refuse a license to whom they pleased, and observed that such an application was never made before. (Salk. 45. 1 Burr. 556.) In *Ex parte Bacon & Lyon*, (6 Cowen, 392,)

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the court below had set aside a regular default, and let the defendant in to plead on payment of costs. The plaintiff moved the court above for a mandamus to the common pleas to vacate that rule. It was observed that "the common pleas must be their own judges, upon the circumstances before them, whether they will set aside a default. *The granting or refusing of such an application is governed by no fixed principles.* No positive rule of law has been violated by the court below, nor can we fix bounds to their discretion upon the subject." In *Ex parte Benson*, (7 Cowen, 363,) a motion had been made against the relator in the court below and taken by default, his attorney being absent. The court refused to open the default, and an application was made to this court for a mandamus. The mandamus was refused, on the ground that it was a mere matter of discretion with the court whether they would open the rule or not; that so far as the rules of practice in inferior courts rest in discretion and violate no rules of law, the S. C. would not interfere with them. In *Ex parte Baily*, (2 Cowen, 479,) a motion was made in the court below for a new trial on various grounds, and among others that the verdict of the jury was against the weight of evidence. The motion was refused, and upon an application for a mandamus, the supreme court observe, "that though in extreme cases we might interfere, and control inferior courts upon questions of fact, presented in the form of a motion for a new trial, yet it is a remedy which should be used very sparingly. A contrary course would draw before that court an examination of those questions which address themselves merely to the discretion of the inferior court. We should be perpetually appealed to for the adjustment of rights undefined by law. This would result in an endless conflict of opinion upon questions, which must from their very nature be finally determined by the court below, because they cannot be reached by the rules of law; and although we may think the inferior court erred, yet we will not interfere. Extreme cases may be supposed, which form exceptions to this doctrine; as where an action is brought on a promissory note, the execution of which is proved beyond all doubt, and yet the jury find against it, should the court below refuse a new trial, we might interfere: but in ordinary cases it would be improper; for even where a verdict is plainly against law, yet a new trial may in many cases properly be denied, as if the controversy be very trifling in its nature or insignificant in amount. These cases sufficiently indicate the nature of the discretion, the exercise of which by inferior tribunals or officers this court will not undertake to regulate or coerce. It is that discretion which is not and cannot be governed by any fixed principles or rules." (Per Sutherland, J. in *The People v. The Superior Court of New York*, 5 Wend. 114, 123, 124.) We shall hereafter examine the application of this rule to particular cases when we come to consider in detail how far the remedy by mandamus may be extended to control inferior officers and tribunals.

§ 15. VI. A mandamus will not be issued unless the party against whom it is sought has refused to perform his duty, or by some act equivalent to a refusal manifested such an intention.

Upon this principle where by an act establishing a canal company, it was provided, that certain landholders might call upon them by notice, as direct-

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ed in the act, to execute certain works, communicating with the company's canal and railways; and that, if the company should refuse for six months after such request, the applicants might themselves perform the works in the same manner as the company might have done them. An application being made to the company under this clause, they answered that they would do the works themselves; but they delayed proceeding, and, on remonstrance, gave as a reason, that the proposed operation would interfere with the property of other parties, who were likely, if so disturbed, to bring an action. The company offered nevertheless to proceed if indemnified. The applicants, in answer, stated that they considered the excuse insufficient, and did not understand how they could be expected to indemnify. Six months had at this time elapsed since the original application. The works not being done, a mandamus was applied for. It was held that the writ could not issue, it not appearing from the above facts that, after the consent given by the company to execute the works, there had been any express demand and refusal of performance, or any conduct on the company's part equivalent to such refusal. (*The King v. The Co. of the Brecknock and Abergavenny Canal Nav.* 3 Adol. & Ellis, 217. 4 Nev. & Man. 871. 1 Har. & Woll. 279.) And where by statute, incorporating a canal company, the affairs of the company were to be managed by a committee, who were authorized to appoint a clerk for better carrying into execution the purposes of the act. The committee were required to enter in books an account of their disbursements, receipts, and transactions, and the books were to be open at all reasonable times to the inspection of the proprietors. A proprietor applied to the clerk for an inspection of the books which were under his charge. The clerk said he would refer the demand to the committee. The proprietor attended the committee, and there repeated his request; and the chairman said they would take time to consider it. Ten days afterwards the proprietor applied again to the clerk, who refused the inspection. On motion for a mandamus to the company to allow inspection of the books; it was held that there had been no sufficient refusal by the committee to warrant the application. (*The King v. Proprietors of the Wilts and Berks Canal Nav.* 3 Adol. & Ellis, 477.

§ 16. VII. Nor will this writ be granted where the party applying has slept upon his rights. (See 1 Chitt. Genl. Prac. 791; 1 Grah. Prac. 3d ed. 324.)

Therefore where a plaintiff in a suit which had been carried up by appeal to the Delaware Common Pleas was nonsuited, and five years afterwards application was made to the common pleas to quash the appeal for a defect in the appeal bond, which was refused, the court said, that although the bond was palpably bad, and were the proceedings still *pendente lite* in the common pleas, an alternative mandamus would be awarded, yet after the lapse of five years subsequent to the final decision of the cause they deemed it inexpedient to interfere. (*The People ex rel. Phelps v. Delaware Common Pleas*, 2 Wend. 256.) And upon the same principle where allotments were set out under an inclosure act to a party claiming them, and possession given in or about 1817, and there was no road to them, nor any access but through allotments made or land sold under the act to other persons, on motion, twelve

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years afterwards (viz. in 1829,) for a mandamus to the commissioners (who had not yet published their award) to set out an occupation road to the first mentioned allotments, the court held that the application came too late: and Bailey, J. mentioned a case, (*The King v. The Stainforth and Keadley Canal Company*, 1 M. & S. 32,) where a motion was made in 1813, for a mandamus, directing the commissioners under a canal act to cause a jury to be summoned and compensation assessed for lands taken in 1799, and the court said the application came too late. (*Rex v. Commissioners of Cocker-mouth Inclosure Act*, 1 Bar. & Adol. 378, 380.) And where the relator recovered a judgment before a justice against a constable and his sureties, the former having made himself liable in relation to an execution issued on a judgment in favor of the relator against J. Knox, S. Scutt and J. Stark. The defendants appealed. On the trial of the cause in the common pleas, in February, 1828, it was discovered that the justice, in stating the demand of the plaintiff, had stated that the action before him was brought on a judgment against J. Knox and S. Scutt, omitting the name of J. Stark. The common pleas permitted the plaintiff to withdraw a juror, and the plaintiff on the next day applied for a rule that the justice amend his return, which the court refused, and directed the defendant's attorney to empanel a jury, on the ground that they had erred in allowing the plaintiff to withdraw a juror without the consent of the defendants. A jury was empanelled, who, under the directions of the court, found a verdict for the defendants. The plaintiff excepted to the opinions of the court, and brought a writ of error; but being advised that a mandamus and not a writ of error was the proper remedy, he accordingly applied for a mandamus, directing the common pleas to set aside the verdict and judgment rendered thereon, and to grant the rule for an amendment of the return of the justice. The court denied the motion observing, "here has been a delay of a year since the happening of the errors complained of, and the fact of the party's having been advised that his remedy was by writ of error, furnishes no excuse. This court will not by mandamus disturb proceedings in which parties have so long acquiesced." (*The People ex rel. Beach v. Seneca Common Pleas*, 2 Wend. 264. See also *The Queen v. The Company of Proprietors of the Canal Navigation from Leeds to Liverpool*, 11 Adol. & Ellis, 316. See also *The People ex rel. Oelrichs v. The Superior Court of the City of New York*, 10 Wend. 285; *The People v. The Supervisors of the County of Ulster*, 16 Johns. 59.)

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Mandamus to Inferior Tribunals and Judicial Officers.

§ 17. We have already seen that the writ of mandamus will not be extended to those cases where the right or duty sought to be enforced depends upon the discretion of the person against whom it is demanded. We have also seen that the discretion is one which is in its nature controlled by no fixed legal principles, (§ 14,) for it is obvious, that so far as such principles exist, inferior courts and judicial officers are bound to regard them. Let us now examine some of the cases in detail where this principle has been applied. And

I. It is clear that the regulation of the mere *practice* of the courts ought,

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in a great degree, to depend upon their own discretion, because it is the means to obtain for the party that substantial justice which he seeks, and therefore requires to be varied according to the circumstances of particular cases. To establish an inflexible code of procedure to which the rights of the suitor should bend upon all occasions, would be no wiser than to stretch the man to fit the bedstead instead of lengthening the bedstead to fit the man. Those parts of the practice which are committed to the discretion of the court, are necessarily exempt from the supervision of any other tribunal, and for this reason the writ of mandamus will not lie to compel that discretion to be exercised in any particular manner. Therefore, where a mandamus was moved to compel a court of common pleas to open a rule granted by default, on the ground that the attorney forgot to appear, the supreme court refused the motion, saying "whether the common pleas would open the rule or not, upon the facts disclosed, rested entirely in their discretion; with which we have nothing to do. The question is not, whether we would have listened to the application, in a like case, upon our rules of practice. The court below have their own rules; and so far as they rest in discretion, and violate no rule of law, we uniformly refuse to interfere with them. (Vid. *Ex parte Bacon*, 6 Cowen, 392.) Granting this motion, would be a precedent for reviewing the whole non-enumerated business of every court of common pleas in the state." (*Ex parte Benson*, 7 Cowen, 363, 364.) And in a case where judgment had been entered in the common pleas on an assessment of damages by the clerk, though the rules for interlocutory judgment and assessment had been omitted, and the court afterwards allowed both the omitted rules to be entered *nunc pro tunc*, the supreme court denied a mandamus, directing them to vacate their order to enter such rules, upon the ground that the question below was a mere point of practice with which they could not interfere. (*Ex parte Coster*, 7 Cowen, 523.) And where a court of common pleas had set aside a regular judgment by default against the defendant, a mandamus commanding them to vacate that rule was refused. And the court said "the common pleas must be their own judges, upon the circumstances before them, whether they will set aside a default upon the merits. This is so much a matter of discretion, that we will not interfere by mandamus. The granting or refusal of such an application, is governed by no fixed principles. No positive rule of law has been violated by the court below; nor can we fix bounds to their discretion upon this subject." (*Ex parte Bacon and Lyon*, 3 Cowen, 392, 393. See *People ex rel. Legg v. Onondaga Common Pleas*, 8 Wend. 509; *Vandervoer v. Conover*, 1 Harrison, 271; *Thomas v. Creditors*, id. 272; *Gray v. Bridge*, 11 Pick. 189, 192; *Commissioners v. Lynch*, 2 McCord, 170.) Upon this principle a mandamus will not be granted to control the mere chamber business of the judges of an inferior court, as for instance, where this writ was moved to a judge of common pleas to command him to vacate certain orders which had been made, discharging a defendant upon common bail, it was denied. (*Ex parte Brown*, 5 Cowen, 31, 32. *Rex v. Justices of Essex*, 2 Chitty, 385;) nor to compel a court of common pleas to vacate a rule, allowing a second execution where the first was issued by

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mistake for an amount less than the judgment; (*The People v. The Chautauque Common Pleas*, 1 Wend. 73. See also *Anon.* 2 Halst. 160;) nor where such a court had set aside a ca. sa. for irregularity and required the party against whom it issued, to stipulate that he would not bring false imprisonment, will mandamus lie to compel them to vacate the condition. (*In the matter of Gilbert*, 3 Cowen, 59. See also *The People v. The Montgomery Common Pleas*, 18 Wend. 633; *People ex rel. Hasbrouck v. Ulster Common Pleas*, 18 Wend. 628; *Ex parte Nelson*, 1 Cowen, 417; *Wells v. Stackhouse*, 1 Harrison, 355; *Vanderveer v. Conover*, id. 234.)

§ 18. II. Upon the same principle courts possess a general power to supervise the course of pleading, in accordance however with the rules of law upon that subject. And, therefore, where a mandamus was sought to be directed to the common pleas of Cumberland, to compel them to receive the defendant's plea of justification; and the defendant stated, as the ground of his application, that an action of trespass had been commenced against him, to which he had pleaded—1. The general issue; and—2. A justification. That the plaintiff's attorney declined replying to the plea of justification, but gave notice to the defendant's attorney, that he would apply to the court of common pleas to strike out the said plea; which, upon motion, the court ordered accordingly. Kirkpatrick C. J. observed, "from time immemorial, courts have stricken false pleas and frivolous counts from the record. It is right and proper that they should possess the power, in order to prevent their records from being unnecessarily encumbered. But I am satisfied that a *mandamus* would not lie to compel the court to receive a plea, even if they were wrong in rejecting it. (*Anon.* 2 Halst. 160, 161.) and the supreme court of the United States have decided that they will not exercise any control over the proceedings of an inferior court of the United States in allowing or refusing to allow amendments in the pleadings in cases depending in those courts. (*Ex parte Martha Bradstreet*, 7 Peters, 634.)

§ 19. III. By the peculiar constitution of many subordinate tribunals they exercise the right to decide applications for new trials. And although such applications have been supposed to be addressed to the discretion of the court (Per Ashurst, J. in *Edmonson v. Muchall*, 2 T. R. 4. See however Per Marcy, J. in *Herrick v. Stover*, 5 Wend. 580, 587;) yet it is plain that the increasing certainty of our system of jurisprudence must continually limit that discretion by fixed principles of law. So far as these principles extend the writ of mandamus is a proper remedy under the general rules we have considered. But within the circle of their discretion inferior tribunals and judicial officers are at liberty to decide as they see fit. Therefore, if a jury should return a verdict against the weight of evidence, the writ of mandamus would not lie to control the discretion of the subordinate court to grant or refuse a new trial on that ground. No principle of law is strictly speaking applicable. The question is whether certain evidence proves certain facts. If on this question the court draw different conclusions from that drawn by the jury, a new trial should be granted. (Per Savage, Ch. J. in *The People v.*

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The Superior Court, 10 Wend. 285, 290.) Nor can this writ be employed where a subordinate court sets aside a report of referees, and orders a rehearing because dissatisfied with the finding of the referees upon the facts, or because in the opinion of the court the justice of the case requires a fuller hearing. (*The People, ex rel. Robinson v. The Superior Court*, 19 Wend. 68. See also *Truesdell v. Wheeler*, 2 Aik. 369; also *Petition of Farwell*, 2 New Hamp. 123,) nor (in Massachusetts,) where a court of common pleas grant or refuse a new trial, pursuant to the Stat. of 1820, ch. 79, by which it is provided (in § 7,) that this court in certain cases, shall have power to grant a new trial "for any cause for which, by the common law, a new trial may now be granted, or when, upon due examination, it shall appear to said court that justice has not been done between the parties," because "the legislature intended to vest a discretion in the court of common pleas in this respect," (*Gray v. Bridge*, 11 Pick. 189, 192) In *Ex parte Bailey* (2 Cowen, 479) the verdict of the jury was against the weight of evidence, and the Court of common pleas, on motion, refused a new trial, yet a mandamus commanding them to grant a new trial was refused by the supreme court, who observed; "As to the remedy by mandamus, it may be proper to remark, that though in extreme cases we might interfere, and control the court below upon questions of fact presented in the form of a motion for a new trial, yet it is a remedy which should be used very sparingly. A contrary course would draw before this court, whenever one of the parties should be dissatisfied with the decision of the common pleas, an examination of those questions which address themselves merely to the discretion of that court. We should be perpetually appealed to for the adjustment of rights undefined by law. This would result in an endless conflict of opinion upon questions which must from their very nature be finally determined by the court below, because they cannot be reached by the rules of law; and although we may think the inferior jurisdiction has erred, yet we will not interfere. It is true, that extreme cases may be supposed, which would form an exception to this doctrine. Where an action is brought on a promissory note, the execution of which is proved beyond all doubt, and yet the jury find against it, should the Court below refuse a new trial, we might interfere; but it would be improper to do this, in ordinary cases." And in *The People v. The Superior Court* (cited *supra*) Savage, Ch. Justice, says: "There is no principle of law, strictly speaking, applicable. The question is whether certain evidence proves certain facts. If on this question the court draw different conclusions from those drawn by the jury, a new trial should be granted; and where a court has exercised its discretion in such a case, this court will not interfere. There must be something in the case taking from the court its discretion, to authorize the interference of this court, as in the case put by Mr. Justice Sutherland, where the testimony was clear and explicit, and uncontradicted, and yet a verdict against it, and a refusal to set aside such verdict. In such case there would be no discretion; every verdict must be supported by evidence; where it is not, the law gives to the party injured a legal right to have it set aside, and a new trial ordered. Should any court possessing the power refuse to exercise it in such a case, it would be our duty to correct the error by mandamus.

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In such a case, where there is no dispute about facts, there is no discretion to exercise." See *Anon.* 2 Halst, 160; *Rex v. Justices of Worcestershire*, 1 Chitty, 649; *Rex v. Justices of Carnarvon*, 4 Barn. & Ald. 86; *Rex v. Justices of Monmouthshire*, 4 Barn. & Cresw. 844.

§ 20. IV. In general every court must be the sole judge whether a contempt has been committed against it or not, and the exercise of its judgment is not liable to be controlled by the interposition of the writ of mandamus. (See 4 Black. Comm. 286, also, Staundf. P. C. 73 b.) But if the civil rights of an individual become implicated, this remedy may be pursued. Therefore, upon a motion for a mandamus to the justices of the general sessions of the peace of the county of Oneida, commanding them to attach and punish John Garter, for non-attendance in that court as a witness:—Chamberlain had been indicted for an assault and battery, which was tried at the February term of that court, 1825:—He subpoenaed Garter to attend as a witness in his behalf; he neglected to appear, and was attached; but was discharged by the court, upon his answering, to the interrogatories, that no fees had been tendered to him. The Court said they had looked into this subject, and thought the distinction lay between misdemeanor and felony; that in the former case the defendant must tender his witnesses their fees, as in civil cases; but that in prosecutions for felonies they were compellable to attend without fees. They should have denied this motion at once, on the ground that it sought for a mandamus to compel an inferior court to punish for a contempt, had the matter rested there; for every court must be the sole judge whether a contempt has been committed against it or not; but as the private rights of an individual were also implicated, they had for that reason looked into the merits. (*Ex parte Chamberlain*, 4 Cowen, 49.)

§ 21. V. Many other instances might be found where the writ of mandamus will not lie to inferior courts and judicial officers, because the latter have a discretion beyond the control of the superior tribunal. It is, however, hardly possible to classify them, since the question as to whether such discretion exists, must more or less depend upon the peculiar constitution of the tribunal. When the rules of law are explicit, it must of course abide by them; but there is a very large class of cases, in which, from the necessity of the case, discretion must be exercised. A few of these are here presented, and others will hereafter be mentioned. Mandamus will not lie to compel a county court to accept the report of auditors, (*Truesdell v. Wheeler*, 2 Aik 369;) nor is it the proper remedy where a magistrate rejects a report of referees, though for insufficient reasons. (*Petition of Farwell*, 2 New Hamp. 123. See also *Robinson v. The Superior Court*, 19 Wend. 68, cited *supra* § 19; *The People, Ex rel. Fuller v. Oneida Common Pleas*, 21 Wend. 20.) Where property is seized under the process of a court, as the property of the defendant, and a stranger, alleging that the property is his, applies by motion to have it restored to him, which motion the court refuses to hear, a mandamus will not lie to such court to hear the motion. (*Price v. Shelby Circuit Court*, Hardin, 254;) and upon a motion for a mandamus to the district

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judge of the United States for the southern district of New York to set aside a judgment entered by default on an inquest finding a forfeiture of goods to the United States, against which an information had been filed for a violation of the revenue laws, it was decided by the U. S. Supreme Court, that this was not a proper case for its interposition by way of mandamus, because the application to the district court to set aside the default and inquest, was addressed to the discretion of that court. (*Ex parte Joseph Roberts, Ex parte George Adshead*, 6 Peters, 216.) Where a feigned issue was awarded by a court of common pleas, to try the validity of a senior judgment, the supreme court refused to interfere and direct the order awarding the feigned issue to be vacated. (*The People, Ex rel. Hasbrouck v. Ulster Common Pleas*, 18 Wend. 628.) Where, in an action of trover, there was a recovery in a court of common pleas for less than fifty dollars, and the common pleas made an order allowing the plaintiff full costs upon the ground that the title to land had come in question upon the trial of the cause, and the supreme court, upon the coming in of the return to an alternative mandamus, adjudged that the title to land had not come in question upon the trial of the cause, and accordingly awarded a peremptory mandamus to the common pleas, directing a vacatur of the order for full costs; it was held, in the court for the correction of errors, on a writ of error sued out, that the supreme court had no jurisdiction by mandamus to review the decision of the common pleas. (*The Judges of the Oneida Common Pleas v. The People, Ex rel. Savage*, 18 Wend. 79.) Under the seventh section of the fourth article of the constitution, the judges of the common pleas have a discretion whether they will hear a charge preferred against a justice of the peace; and the supreme court will not interfere with its exercise. (*Ex parte Johnson*, 3 Cow. 371.) On appeal against a conviction for a trespass under stat. 1 & 2 Will. 4. c. 32. s. 30. the appellant admitted the trespass, and only offered evidence, that the property in the land was not as laid in the conviction. The sessions having rejected the evidence, and confirmed the conviction without stating a case, the court refused to call upon them by mandamus to hear the case, since the mistake, if any, was one of law, which the court could not enter into, the appeal having in fact been heard, and no case sent up. (*In re Pratt*, 7 A. & E. 27.) The justices in session will not be compelled to rehear an appeal, on the ground, that they had required the appellant to begin his case. (*Rex v. Suffolk, Justices of*, 6 M. & S. 57.) And where an appeal was given to sessions within six months after the cause of complaint, and a motion was made there within that time, to enter and respite one, which was denied, the court would not grant a mandamus to the justices to receive it after the six months had elapsed. (*Rex v. Derbyshire, Justices of*, Nolan, 29.) An order of removal to E. was made, upon an examination stating a hiring in 1813, and a service in E. under such hiring. On an appeal, upon the ground that there was no such hiring, the respondents proved a hiring in 1810; upon which the sessions refused to go on with the case, and quashed the order. A mandamus to enter continuances and hear the appeal was refused—(*Ex parte Broseley, Inhab. of*, 7 A. & E. 423. It was not alleged that the appellant

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parish was in fact misled)—because the sessions had in fact heard; and the variance was material under stat. 4 & 5 Will. 4. c. 76. s. 81. (When appellants may give fresh notice of appeal against an order of removal, vide *Regina v. Middlesex, Justices of*, 10 Dowl. P. C. 163.) On an appeal against a borough rate, no notice being proved except as above mentioned, the recorder refused to hear the appeal, or to enter and respite; and a mandamus was refused to compel him to hear it, though it was stated on affidavit, that the appellant was a party aggrieved, and that the omission in the notice arose from oversight. (*Rex v. Bond*, 6 *ibid.* 905.) The justices will not be ordered to review their decision on an appeal, on the ground, that the conclusion drawn by them was not warranted by the facts proved—(*Rex v. Worcestershire, Justices of*, 1 Chitt. 649. *Rex v. Carnarvon, Justices of*, 4 B. & A. 86)—nor in cases of appeal to give their reasons for their judgments at sessions; nor to make special entries on their records—(*Rex v. Devon, Justices of*, 1 Chitt. 34)—nor to direct them to enter continuances. (*Rex v. — Justices of*, *ibid.* 164. *Rex v. Jukes*, 8 T. R. 625.) On appeal against an order of removal coming on for trial, the sessions, on an alleged defect in the notice of appeal (that the notice had been served on one only of several parish officers,) dismissed the appeal unheard, confirmed the order, and, (at the instance of the appellants) granted a case. The appellants without bringing up the case moved for a mandamus to the justices to enter continuances and hear the appeal; but the writ was refused, Lord Denman observing, “If any thing wrong has been done, the justices have given you the opportunity of setting it right.” (*Rex v. Northamptonshire, Justices of*, 6 A. & E. 111.) On appeal against an order of removal, the sessions, without going into the appeal, quashed the order, subject to a case on a point said to turn upon the construction of stat. 4 & 5 Will. 4. c. 76. The case not being brought up, the court of Queen’s Bench refused to hear the point discussed on an application by the respondents for a mandamus to enter continuances and hear the appeal. (*Rex v. Suffolk, Justices of*, *ibid.* 109.) The writ will not be issued to dismiss an appeal at the sessions; (*Rex v. Wills, Justices of*, 2 Chitt. 257;) nor to justices at sessions requiring them to state a special case. (*Peat’s case*, 6 Mod. 226. 310, *ante*, 2312. Where the divisional justices of the city of Dublin refused to grant a certificate pursuant to stat. 55 Geo. 3. c. 104. s. 4. Irish, the court refused a mandamus. *Rex v. Police, Divisional Justices of*, Alcock & Napier, Irish, 269. The act 53 Geo. 3. c. 111. Cork Local Act is repealed by stat. 6 & 7 Will. 4. c. 116. *Jones v. Hayes*, 1 Jebb & Symes, Irish, 656.) A mandamus will not be granted to the chairman of sessions, commanding him to issue warrants for the apprehension of persons against whom a true bill had been found for keeping a gambling house. (*Regina v. Middlesex Sessions, Chairman of*, cor. Williams J. MS. H. T. January 24, 1842. 1 Dowl. P. C. N. S. 544.) The court will not order magistrates to issue warrants of distress to levy a poor rate on persons who have refused to pay, unless they have been previously summoned by the justices; because, a summons must precede a warrant of distress, which is in the nature of an execution. (*Rex v. Benn*, 6 T. R. 198.) Neither will justices be enforced to make an order of maintenance on a particular parish; (*Rex v. Middlesex, Justices of*, 4 B. & A. 298. *Rex v.*

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Eye, Corporation of, *ibid.* 271. *Rex v. Truro, Mayor of*, 3 *ibid.* 590;) because magistrates have never been compelled to come to any particular decision. (*Rex v. Cambridgeshire, Justices of*, 1 D. & R. 325. *Rex v. Norfolk, Justices of*, 5 B. & A. 484. *Rex v. Monmouthshire, Justices of*, 4 B. & C. 844.) The writ will not be issued upon a supposed failure of duty in the justices of the peace to remove a man from a parish, after he had offered security to indemnify the parish. (*Regina v. Cory*, 3 Salk. 230.) Nor to the justices of sessions to allow an item of charge in the coroner's account. (*Rex v. Kent, Justices of*, 11 East, 229.) Where the inhabitants of a town, not within a hundred, had incurred costs in defending actions brought on stat. 57 Geo. 3. c. 19. s. 38. for damages done by riotous assemblies:—It was held, that mandamus would not lie to two justices of the town to make and levy a rate for paying the costs. (*Rex v. King's Lynn, Justices of*, 3 B. & C. 147. 4 D. & R. 778.) Justices will not be compelled to rate a parish within their jurisdiction, in aid of another parish, having exclusive jurisdiction, because it would be requiring them to inquire into that, which they have no means of knowing. (*Rex v. Holbeche*, 4 T. R. 778.) A mandamus will not lie to make a new election of a county treasurer, on the ground, that one of the justices who had voted at the election had not taken the qualification oath required by stat. 18 Geo. 2. c. 20.; because the construction to be put upon such statute is, "that the magistrate shall be only so far disqualified from acting, that he shall be subject to certain penalties if he does act." (*Per Bayley J. in Rex v. Herefordshire, Justices of*, 1 Chitt. 700.) Where magistrates, from a doubt of their jurisdiction, decline giving possession of premises to a landlord pursuant to stat. 11 Geo. 2. c. 19. s. 16, the court will not, unless it be clear, that they have acted incorrectly, compel them to do so. (*Ex parte Fulder*, 8 Dowl. P. C. 535.) The court will not grant a rule nisi for a mandamus to compel justices to issue their warrant to levy expenses for cutting a hedge, pursuant to stat. 5 & 6 Will. 4. c. 50. s. 65, unless it shall appear, that a demand has been made of the expenses from the person sought to be charged, and that the justices were informed of that demand. (*Ex parte Whitmarsh*, *ibid.* 431.) As to mandamus to Ecclesiastical Courts and Institutions, Quarter Sessions and Justices and Courts, Lord and Baron—See 3 Stephens Nisi Prius, 2309, 2311, *et seq.* 2316 *et seq.*)

§ 22. Again: The court will not grant a mandamus commanding justices to do an act which may render them liable to an action; (*Rex v. Buckinghamshire, Justices of*, 1 B. & C. 485. *Rex v. Greame*, 3 A. & E. 615. *Rex v. Morgan*, *ibid.* 616. n.); and under that principle, a writ was refused to compel a magistrate to enforce a conviction, when it was doubtful whether such conviction was good in consequence of the evidence not having been stated; (*Rex v. Broderip*, 5 B. & C. 239. 7 D. & R. 861;) nor to do that which may occasion costs for which they have no means for reimbursement; (*In re Lodge*, 2 A. & E. 123;) but the court will put justices in motion in cases where they ought to act. (*Rex v. Barker*, 6 *ibid.* 388.) Neither will a mandamus be granted to compel a magistrate to enforce a conviction for the plaintiff, where he

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had returned that the defendant was convicted of the penalty before him, and that the conviction was invalid in law. (*Rex v. Robinson*, 2 Smith, 274.)

§ 23. Let us now consider some of the cases in which the remedy by mandamus is applicable to inferior tribunals and judicial officers. And under the general rules we have above considered.

I. It is the remedy to compel a discretion to be exercised or a judgment to be given.

Thus in an old case (*Rex v. Tod*, 1 Strange, 530;) justices of the peace had a jurisdiction given them by statute to receive an information in some cases and make their determination upon a seizure of brandy. Upon information exhibited by the officer of the customs, the fact appeared not to warrant the seizure, but the justice in favor of the officer refused to dismiss the information, so that the owners might have their brandy again, and a mandamus was granted to compel him to determine the matter. (See Bac. Ab. tit. mandamus D.) And where a court of inferior jurisdiction not possessing the power to grant new trials, (as for instance—a court of common pleas in New York, where neither of the judges is a counsellor at law, under the stat. 1 Laws of New York, 395, *Haight v. Turner*, 2 Johns. 371;) a court of sessions (*The People v. The Justices of Chenango*, 1 Johns. Cas. 180;) or a justices court, (*Forman v. Murphy*, 2 Pennington, 2d ed. 747;) nevertheless undertakes to do so this writ will lie to compel a judgment. (See also *Fish v. Weatherwax*, *supra* p. 215. *The People v. Stone*, 9 Wend. 182. *Horne v. Barney*, 19 Johns. 247. *Berry v. Callet*, 1 Halst. 179.)

A distinction is however to be observed between compelling a judgment to be given or a discretion to be exercised and compelling a particular act to be done by the officer or tribunal who possesses that discretion—the distinction between a direction *to act* and a direction *how to act*; (Per Tracy, Senator, 18 Wend. 92.) “Thus, we find it given in Bacon, that a mandamus will lie to compel a judgment to be rendered, but not what judgment to render; to justices to receive and proceed upon a complaint, but not what decision to make; to compel the ordinary to grant letters testamentary, but not to what person. It has therefore been held not to lie to the sessions to compel them to admit an appeal in regard to poor rates, 4 T. R. 488, nor to commissioners of bankruptcy to certify the bankrupt's conformity to the act, 7 East, 92; in both cases, the officers having a discretion. Nor does it lie to compel justices to come to a particular decision, nor to make an order of maintenance, nor to grant a license. (3 Black. Comm. 110, note.) More recently, in *Rex v. Justices of Droon*, (1 Chitty's R. 34,) the court refused to compel a quarter sessions to enter continuances, saying, “Our powers are great, but they are not unlimited; they are bounded by some lines of demarcation; we are not aware that we have power to interfere with the court below in the way suggested.” Again, in *Ex parte Morgan*, (2 Chitty, 250,) a mandamus was denied to compel a court of inferior jurisdiction to grant a new trial in a cause before it, where alleged injustice had been done to one of the parties, the court remarking, “We may command an inferior court to give judgment in

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a matter fit and proper for its cognizance, but we cannot interfere to regulate its practice, because every inferior court is the proper judge of its own practice." In the case of *The King v. The Justices of Middlesex*, (4 Barn. & Ald. 300,) Abbott, Ch. J. says: "There is not an instance can be cited where the court has granted a mandamus to justices to compel them to come to any particular decision."

In all the state courts of this country where the question has been agitated, except in New York, the same distinction as to the proper functions of a mandamus seems to have been rigidly observed. In Pennsylvania, (*Commonwealth v. Judges of Com. Pleas of Philadelphia County*, 3 Binney, 273,) it was decided that a mandamus would not lie to the judges of the common pleas, to reinstate an appeal which they had dismissed, because a mandamus cannot go to an inferior court compelling them to make a particular decision, but merely to decide. In *Griffith v. Cochran*, (5 Binney, 103,) Tilghman, Ch. J. says: "The principles which govern the court in issuing writs of mandamus, are well understood. Where a ministerial act is to be done, and there is no other specific remedy, a mandamus will be granted to do the act which is required. But where complaints are against a person who acts in a judicial or deliberative capacity, he may be ordered by mandamus to proceed to do his duty, by deciding and acting according to the best of his judgment; but the court will not direct him in what manner to proceed." And so rigidly was this distinction adhered to by the same court, that in *Commonwealth, Ex rel. Breckenridge, v. Judges of C. P. of Cumberland County*, (1 Serg. & Rawle, 187,) it refused a mandamus to compel a court of common pleas to proceed to examine a person applying to be admitted as an attorney, notwithstanding the supreme court was satisfied that he came within the rule of the common pleas. Their refusal was put on the ground that the admission of an attorney is not a ministerial but a judicial act, and therefore not the subject of the writ of mandamus.

In New-Jersey the same distinction was recognized. In *Seving v. Inhabitants of Alloways Creek*, (5 Halstead, 58,) where a mandamus was refused, on the principle, that "to officers a writ of mandamus may go to direct them how to proceed, and what to do; but a mandamus to a court only to direct them to proceed according to law, and not how to proceed."

So in Kentucky, in *The County Court of Warren v. Daniel*, (2 Bibb, 573,) it was decided that "a mandamus is a proper remedy to compel an inferior court to adjudicate upon a subject within its jurisdiction, where it neglects or refuses to do so; but where it has adjudicated, a mandamus will not lie for the purpose of revising or correcting its decision.

And in Massachusetts, (*Chase v. Blackstone Canal Co.* 2 Pick. 244,) the court say: "This writ lies either to compel the performance of ministerial acts, or is addressed to subordinate judicial tribunals, requiring them to exercise their functions, and render some judgment in cases before them, when otherwise there would be a failure of justice from delay or refusal to act. But where a subordinate tribunal has acted in a judicial capacity, upon a question properly submitted to its judgment, a mandamus will not be granted to compel it to reverse its decision.

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Analogous decisions may be found in the courts of New Hampshire, Virginia, and Ohio, and probably have been made in several other states, inasmuch as we find at an early day an express decision on this point, made by that court whose opinion has rarely failed to be of controlling authority for the state courts upon any important general principle. The decision to which I refer, is reported in *United States v. Lawrence*, (2 Dallas, 42,) where it was sought to compel a district judge to issue a warrant to arrest an alleged deserter from the French naval service, under a treaty stipulation, and in which it was the clear and unanimous decision of the court, that the district judge having acted judicially in deciding that the evidence was not sufficient to authorize his issuing a warrant, the supreme court, however it might differ in opinion from the judge as to the sufficiency of the proof, had no power to compel him to decide according to the dictates of any judgment but his own. And the court there, as well as in the subsequent case, *Life & Fire Insurance Co. of N. Y. v. Adam*, (9 Peters, 602,) recognizes the principle contended for by the counsel in the first cited case, that a mandamus is founded on the idea of a default, as where an inferior court will not proceed to judgment, or a ministerial officer will not do an act which he ought to do; but is never issued to a judge who had proceeded to give judgment according to the best of his abilities. And in the case last cited, Chief Justice Marshall says: "On a mandamus a superior court will never direct in what manner the discretion of an inferior court shall be exercised, but will, in a proper case, require the inferior court to decide."

In the cases of *Wilson v. Supervisors of Albany*, (12 Johns. R. 416,) and *Ex parte Nelson*, (1 Cowen, 423,) the court refused the writ, on the ground that where a discretion is vested in any inferior jurisdiction, and that discretion has been exercised, a mandamus will not be granted, because the court cannot control, and ought not to coerce that discretion. The cases *Ex parte Bacon & Lyon*, (6 Cowen, 392,) and *Ex parte Benson*, (7 id. 363,) are on the same principle, as is also that of *Hull v. Supervisors of Albany*, (19 Johns. R. 259,) in which the principle is definitely and accurately stated by the court, that "where the inferior court has discretion, and proceeds to exercise it, this court has no jurisdiction to control that discretion by writ of mandamus. But if subordinate public agents refuse to act or to entertain the question for their discretion in cases where the law enjoins upon them to do the act required, this court may enforce obedience to the law by mandamus, where no other legal remedy exists." (Per Tracy Senator in *Judges of the Oneida Common Pleas v. The People*, 18 Wend. 79, 92, 95, 96.) This doctrine was subsequently considered by the supreme court of the State of New York, in the case of *The People v. The Judges of Dutchess C. P.* (20 Wend. 658, 660, 661,) and the general principle re-affirmed Mr. Justice Bronson observing: "In *Chase v. The Blackstone Canal Co.*, (10 Pick. 244,) the court refused to issue a mandamus to an inferior tribunal which had acted in a judicial capacity upon a question properly before it. They said, the writ lies either to compel the performance of ministerial acts, or is addressed to subordinate judicial tribunals, requiring them to exercise their functions and render some judgment in cases before them, when otherwise there would be a failure of

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justice from a delay or refusal to act. But when the act to be done is *judicial* or discretionary, this court will not direct what decision shall be made. And they referred with approbation to the case of *The U. S. v. Lawrence*, (3 Dall. 42,) where it was held by the supreme court of the U. S. that they could not interpose by mandamus to compel a district judge to decide according to the dictates of any judgment but his own. In the case of *Strong, petitioner*, 5 C. (20 Pick. 484,) *Morton, J.* said, this high judicial writ not only lies to ministerial, but to judicial officers. In the former case, it contains a mandate to do a *specific act*, but in the latter, only to *adjudicate—to exercise a discretion* upon a particular subject. In *Ex parte Hoyt*, (13 Peters, 279.) the district court had made an order in relation to the custody of certain goods which had been seized by the collector, and the supreme court refused a mandamus to compel the district court to vacate its order. Mr. Justice Story, who delivered the opinion, said, the application was not warranted by the principles and usages of law—that it was neither more nor less than an application for an order to reverse the solemn judgment of the district judge in a matter clearly within the jurisdiction of the court, and to substitute another order in its stead. He added, it has been repeatedly declared by this court that it will not, by mandamus, direct a judge *what* judgment to enter in a suit, but will only require him to *proceed* to render judgment. The same learned court made a similar decision in *Ex parte Whitney*, (13 Peters, 404.) They said, a writ of mandamus is not the appropriate remedy for any orders which may be made in a cause by a judge in the exercise of his authority, although they may seem to bear harshly or oppressively upon the party." In the case of *The King v. The Justices of Monmouthshire*, (7 Dowl. & Ry. 334,) the court of sessions had quashed an appeal, and a motion for a mandamus was denied by the king's bench. *Abbott, C. J.* said, "where the sessions *forbear to give any judgment at all*, this court will interpose to compel them to *go on* and pronounce judgment; but where they have *actually given judgment*, even under a mistake of law, this court has never yet interposed to disturb their decision." He added, "if we were to grant this application, we should be opening a door to continued litigation and enormous expense, in every case where the propriety of the decision of the sessions might be questioned, either on the ground of mistake in law or fact. There seems to be no authority for such a proceeding, and as our predecessors have not recognized its propriety, we are certainly not disposed to take a step which is so pregnant with mischievous consequences." And *Bayley, J.* said, "the sessions having decided the case, and quashed the order, we are not at liberty to consider whether they have done right or wrong." In *Rex v. Justices of Wilts*, (2 Chitty's R. 257,) there was a motion for a mandamus to dismiss an appeal, on the ground that the sessions had decided wrongly; but the application was refused; and when the court was pressed with the argument that the party had no other remedy, it was answered by *Bayley, J.*, that "there are many cases in which there is no other remedy against the sessions, where we should not interfere." *The King v. The Justices of Cambridgeshire*, (1 D. & R. 325,) proceeded on the same principle. In *Squire v. Gale*, (1 Halst. 156,) the supreme court of N. J. held, that a mandamus would lie to an inferior court to command

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them to proceed to judgment, but not to command them to proceed to any particular judgment. (*Roberts v. Holsworth*, 5 Halst. 57; *Hawkins v. Bennett*, 7 Halst. 179, and *The County Court of Warren v. Daniel*, 2 Bibb R. 573, are to the same effect." See also *Gray v. Bridge*, 11 Pick. 189; *Morse*, petitioner, 18 id. 443. *Life Ins. Co. v. Adams*, 9 Peters, 573. *Anon.* 9 Wend. 472. Unless it is clearly shown that such discretion has been abused. *Commissioners v. Lynah*, 2 McCord, 170. See *The People v. The Judges of Dutchess C. P.* cited *supra*. The marginal note to *Blunt v. Greenwood*, 1 Cowen, 15, and the opinion of Mr. Justice Sutherland, in *The People v. The Superior Court of New York*, 5 Wend. 114, are questioned by Senator Tracy, in the opinion above referred to and shaken by *The People v. The Judges of Dutchess Co.* cited *supra*.)

§ 24. II. It is the remedy to compel a judicial officer to sign or amend a bill of exceptions or settle a case, according to the facts. (*Delevan v. Boardman & White*, 5 Wend. 132. See also note, *id.* *The People v. The Judges of Washington*, 1 Caines, 511; *Sikes v. Ransom*, and the other cases cited *infra*.) But it is necessary that the bill or case should state the facts correctly, (*State of Ohio v. G. Todd, et al.* 4 Ohio R. 351. *The People v. Judges of Westchester, supra* p. 118,) and also that it should be tendered in time. Under the former practice in New York, a bill of exceptions should, regularly have been tendered at the trial, or at least during the continuance of the term, and the court could not be compelled to seal it at a subsequent term. Where, therefore, a bill was tendered to a court of common pleas in January term, and application was made in June term to amend it, and the court refused, a motion for mandamus was denied, though the power to compel an amendment was conceded. (*Sikes v. Ransom*, 6 Johns. 279.) So this remedy was denied. And where on the return to an alternative mandamus, commanding the judges of a court of common pleas to sign and seal a bill of exceptions, or show cause, &c. it appeared, that the bill of exceptions was not tendered to the judges at the trial, but was presented to them individually, at different times, after the court had adjourned for the term, this court refused to grant a peremptory mandamus, because the facts on which a bill of exceptions is taken must be reduced to writing at the time, and presented distinctly to the court, during the trial, or at least, during the continuance of the term. (*Midberry v. Collins et al. Overseers &c.* 9 Johns. 345.)

§ 25. III. It is the remedy to compel an inferior court to grant the usual legal process to enforce a judgment. Thus, in New-Jersey, where a justice of the peace entered a judgment against a defendant and afterwards made a conditional order that the judgment should be opened upon the payment of costs by the defendant on a certain day, and notwithstanding the defendant neglected to pay the costs on the day prescribed, the justice refused to issue execution after being requested by the plaintiff so to do, a mandamus was granted to compel him to perform this duty; (*Terhune v. Barcalow*, 6 Halst. 33. See *Laud v. Abrahams*, 3 Greene, 22.)

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§ 26. IV. It is the remedy to compel an inferior court of appellate jurisdiction to do those acts which the law requires it to perform, in order to render an appeal effective. Therefore, where in New Jersey an appeal was taken from the judgment of a justice to the common pleas, and the appeal bond had been delivered; The justice, either from the want of an opportunity or forgetfulness, as he himself states, did not send up the proceedings, &c. to the court on the first day of the term. The appellant perceiving that the justice had not sent up the proceedings as was required of him by law, went to the house of the justice and procured from him the transcript, appeal bond, &c. and brought them into court during the term, but after the first day, when they were duly filed. The next following term the court dismissed the appeal, and assigned the following reason for so doing:—That the transcript of the justice was not filed on the first day of the court next after the judgment was given by the justice below. The court ordered a mandamus because the act requiring the appeal papers to be sent on or before the first day of term is only directory to the justice, not to the court. (*The State v. The Judges of Bergen*, 2 Pennington's R. 2d ed. 541;) And in the same state, where a court of common pleas dismissed an appeal for want of the necessary affidavit; the affidavit which had been made and which in other respects was sufficient, having been written on the back of the appeal bond, the court granted a mandamus observing: "The court of common pleas, no doubt, dismissed the appeal in this case, in consequence of what was said by this court, in *Freas v. Jones*, (3 Green's R. 20;) but on one or two occasions, since that case was decided, we have expressed an opinion, that the objection ought to be to the bond, and not to the affidavit. The party by putting his affidavit on the bond, has in effect deprived his adversary of the benefit of it: for the court of common pleas cannot deliver the bond to the appellee, for prosecution, without delivering with it, the affidavit also, which ought not to be done. If the objection had in this case, been made to the bond, the appellant might immediately have substituted a new one; but another affidavit would have come too late. Let a mandamus therefore issue, as prayed for." (*Robbins v. Bonnel*, 1 Harrison, 234. See also *Freas v. Jones*, 3 Green, 20; *Carman v. Smick*, 2 id. 117.) And in the same state where an appeal bond without a seal was accepted and returned by the justice, and the common pleas dismissed the appeal for want of a valid appeal bond, and refused to permit the appellant to put in a new bond, the supreme court granted a mandamus, because, by the statute (Harr. Comp. 5) "the Court may permit the appellant to substitute a new appeal bond in the place of the appeal bond filed and sent up by the justice," and the ends of justice as well as the rule of law, require that it should receive a liberal construction. (*Garrabrant v. McCloud*, 3 Green R. 462.) But a mandamus will not be granted to restore an appeal which has been dismissed because there was no subscribing witness to the appeal bond, unless the appellant and his surety had offered instantaneously to re-execute the bond in the presence of one or more witnesses or to substitute a new bond; (*Thorpe v. Keeler*, 3 Harrison, 251. The case of *Rockefeller v. Rhea*, 7 Halst. 180, is noticed and questioned in this case.) And a peremptory mandamus was ordered to a court of common pleas, command-

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ing them to reinstate an appeal dismissed for want of prosecution at a special term after trial demanded (*Ten Eyck v. Farlee*, 1 Harrison, 269. See also *Bowlsby v. Johnston*, 1 Green, 350; *Laird v. Abrahams*, 3 id. 433; *Adams v. Mathis*, 3 Harr. 310; *The People v. The Judges of Niagara Common Pleas*, 1 Howard Sp. T. Rep. 196.)

§ 27. V. It is the remedy to compel such a tribunal to grant or vacate an order for a new trial where there is no discretion to do otherwise.

Thus, if the testimony in a case were clear, explicit and uncontradicted, and yet a verdict against it, the superior tribunal would compel the inferior to set aside the verdict; or if the inferior court should deny to a party the benefit of an established rule of practice, not depending at all upon circumstances, a mandamus would be granted. (Per Sutherland J. in *The People v. The Superior Court*, 5 Wend. 114.) The granting or refusing of a new trial is not a matter of discretion, where, on an application for such trial on the ground of newly discovered evidence, it clearly appears that, with ordinary diligence, the evidence might have been produced at the former trial; or where the newly discovered evidence consists merely of additional facts and circumstances going to establish the same points principally controverted when the trial was had, or of additional witnesses to the same facts and circumstances: and where a court of subordinate jurisdiction grants a new trial in a case where those objections exist, a mandamus will be awarded, directing the rule granting a new trial to be vacated. (*The People v. The Superior Court*, *ut sup.* S. C. 10 Wend. 285. See also *Commrs. v. Lynah*, 2 McCord, 170.) In the case of *The People v. Niagara Common Pleas*, (12 Wend. 246;) it was held that when a court of common pleas set aside a report of referees on the merits, and erred in so doing, a mandamus lay to correct the error.

§ 28. VI. This remedy has been employed to compel a court of inferior jurisdiction to admit or restore an attorney, but it is doubtful whether it can properly be extended to this purpose. Thus it has been allowed to restore one to an attorney's place in an inferior court; because his is an office concerning the public justice; and he is compellable to be an attorney for any man; and has a freehold in his place; (Bac. Ab. tit. mandamus C. Lev. 75 Sid. 152 Keb. 549;) and accordingly in Hurst's case, one was restored to an attorney's place of the Court of Canterbury, and in Collins' case, one was restored to an attorney's place, of the liberty of St. Martin's le Grand. So a mandamus was granted to the Mayor of Reading, for an attorney of B. R. who was prohibited to practice in an inferior court of Reading; (Bac. Ab. tit. mandamus C. Vent. 11 Sid. 410, Mod. 23.) In the case of *The People v. The Justices of Delaware*, (1 Johns. Cas. 181,) the supreme court directed the restoration of an attorney who had been removed from his office by a court of common pleas, but it is not by any means to be inferred from this case that the supreme court intended to assert a general power to interfere by mandamus with the discretion of inferior courts in the selection and control of their attorneys, for the court say: "By the act of the legislature of this state, if a court of common pleas remove an attorney from office, he cannot be admitted to practice here, although he should also be an attorney of this court. If,

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therefore, we could not revise the proceedings of the courts of common pleas in this respect, they might disqualify any attorney of this court, and however unjust it might be, it would not be in our power to afford relief. This would indirectly give them the power of superintending and controlling the officers of this court." It is upon this view that Senator Tracy in his able opinion in the case of *The Judges of the Oneida Common Pleas v. The People*, reconciles this decision with the general principles above considered. It is supposed that the correct rule upon this subject is laid down in the case of *The Commonwealth ex rel. Breckenridge v. The Judges of Common Pleas of Cumberland Co.* (1. Serg. & Rawle, 87.) A mandamus was there refused to compel a court of common pleas to proceed to examine a person applying to be admitted as an attorney, notwithstanding the supreme court was satisfied that he came within the rule of the common pleas. Their refusal was put upon the ground that the admission of an attorney is not a ministerial but a judicial act, and therefore (as we have before seen) not the subject of this writ. It is perhaps worthy of remark, that this question was raised in the Supreme Court of the United States, in *Ex parte Burr*, (9 Wheaton, 529,) where the authorities from Bacon's Abridgment and the case of *The People v. The Justices of Delaware* were cited in the argument of Mr. Emmet. Chief Justice Marshall declined giving a decision upon this point, although he expressed an opinion that the court would not interfere unless the conduct of the inferior tribunal was "irregular or flagrantly improper." But it has been adjudged that no mandamus lies to restore a proctor of Doctor's Commons, admitting that no appeal lay from the Dean of the Arches, to the Archbishop as visitor; because this is an ecclesiastical office and a matter properly and only cognizable in that court; and that the temporal courts are not to intermeddle or inquire into their sentence, or into the proceedings in any matters whereof they have a proper jurisdiction, but are to give credit thereunto; although it was urged that if a mandamus did not lie in this case, the party would be without remedy, for that no assize would lie of this office; and though an action on the case might lie, yet it might be defective, because the jury might not well compute the damages in proportion to the loss of a man's livelihood; besides it was urged that a mandamus ought to lie in this case, as well as for an attorney of an inferior court, because this is an office of a more public concern; (Bac. Ab. tit. Mandamus C. Carth. 169, 170, 3 Lev. 309, 3 Mod. 333, Skin. 290, pl. 1, Lee's case Show. 217, 251, 261, S. C. by the name of *The King v. Oxenden*, 3 Mod. 332, 3 Salk. 230, pl. 4 Holt, 435, pl. 1.) And the court say in 3 Mod. 333, that a proctor is not an officer properly speaking; it is only an employment in that court which acts by different rules from the King's Bench. Nor will a mandamus lie to the Archbishop of Canterbury to issue his fiat to the proper officer, for the admission of a doctor of civil law, a graduate of Cambridge as an advocate of the Court of Arches: for he has no specific legal right to such admission; (*Rex v. Archbishop of Canterbury*, 8 East, 213. See further *Rex v. Doctor Ward*, 2 Strange, 893. Fitzgibb. 123, pl. 8, 194, pl. 7, Barnard, K. B. 254, 294, 380, 411. *The King v. Dr. Bettesworth*, Str. 159, Andr. 21, Barnard, K. B. 40. See 2 Str. 1032, Andr. 20, 185, S. P.) See infra. § 37, tit. office.

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§ 29. VII. In conclusion it may be generally stated under the rules we have before considered, that this writ lies to an inferior court or judicial officer to compel the performance of any duty, whether ministerial or judicial; so that there shall not be a failure of substantial justice. (*Chase v. Blackstone Canal*, 10 Pick. 244; *Commonwealth v. Hampden*, 2 id. 414; *Springfield v. Hampden*, 4 id. 68; *Jackson v. Randall*, 7 Mass. 340.) As to compel a court of sessions to enter the verdict of a jury in the assessment of damages, (*Commonwealth v. The Justices of the Sessions of Middlesex*, 9 Mass. 388; *Commonwealth v. The Justices &c. of Norfolk*, 5 id. 435;) or to proceed in the trial of an indictment; (*In the matter of James Turner*, 5 Ohio R. 542,) or, in Massachusetts, to erect or provide a house of correction under the stat. 1787, c. 54. § 1.; (*Commonwealth v. The Justices &c. of Hampden*, 2 Pick. 414;) or to proceed to review and settle damages, as in the following case:— By the sixth section of the charter of the New Jersey Railroad and Transportation Company, the owner of any land taken by the company, who may feel himself aggrieved by the decision of the commissioners appointed to assess the damages in his case, may appeal to the next court of common pleas of the county in which the land is situated; and the said court, in a summary way, either with or without a jury, is to review and settle the amount of damages. A mandamus was directed to be issued, where the common pleas ordered all proceedings on the appeal to be stayed until a certiorari between the parties should be decided in the supreme court. (*Budd v. New Jersey Railroad Company*, 2 Green, 468;) or to compel a court of common pleas to enter or vacate an order where the justice of the case manifestly requires it, and there is no discretion as where on a demurrer to a declaration for the cause that the caption of the declaration was of a day anterior to the accruing of the cause of action, a court of common pleas gave judgment for the plaintiff, and also allowed him to amend his declaration so as to cure the defect, and at the same time refused leave to the defendant to plead to the amended declaration, a mandamus was awarded directing the common pleas either to vacate as much of their order as gave the plaintiff leave to amend, or so much thereof as refused the defendant leave to plead. (*The People v. The New York C. P.* 18 Wend. 534.) And upon this principle it has been decided that a rule to show cause will be granted to a court of common pleas, why a mandamus should not issue to compel them to permit a plaint to be filed, nunc pro tunc after a writ of error had been brought to the supreme court, and the want of such plaint assigned for error. (*The People v. Judges of Westchester*, Ca. C. 55. See further, *Matter of Highway*, 3 Harrison, 291; *Blunt v. Greenwood*, 1 Cowen, 15; Also *Ex parte Boatwick*, 1 Cowen, 143; 1 Chit. Genl. Prac. 795, 796; 1 Grah. Prac. 3d ed. See further upon the general application of mandamus to inferior courts; *People ex rel. Griffin v. The Judges of the Jefferson Comm. Pleas*, 2 Howard Sp. T. R. 59. *In re Thomas W. Cook*, id. 109; *Ex parte Ostrander*, 1 Denio. 679; *Rex v. Hewes*, 3 Adolph. & Ellis, 725; *Porter v. Harris*, 4 Call, 485; *Jared v. Hill*, 1 Blackford, 155; *Johnson v. Randall*, 7 Mass. R. 340; *Burnet v. Warren*, Circuit Court Hardin, 172; *Saunders v. Nelson*, id. 17; *Blake v. Boggs*, 1 Mis. 116; *Kerr v. Rector*, id. 117; *Erown v. Crippin*, 1 II. & M. 173.)

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Of Mandamus to Inferior Officers.

§ 30. As we have already seen, the common law confided to the Court of King's Bench a general supervision over all inferior persons and jurisdictions, and this power, subject to certain local and unimportant modifications, has passed into the hands of the superior judicial tribunals of this country. All men hold their situations as officers, upon the terms of having their conduct examined, and measured by that standard which the law has established. (*McKim v. Odone*, 3 Bland, 407.) It is not necessary that inferior officers should occupy a judicial station in order to be subject to the writ of mandamus. They are amenable to the command of this writ upon a different ground, because the courts which issue it, are made the "general guardians of the rights of all men;" (*Rex v. Bishop of Chester*, 1 Wils. 206; *Regina v. Mayor of Leeds*, 11 A. & E. 512, 3 Steph. N. P. 2292;) or, as it is said in Bacon, Ab. (tit. mandamus,) after Lord Coke, (11 Co. 98, 4 Inst. 71,) "the court of King's bench holding a superintendency over all inferior courts and magistrates may by the plenitude of its power, correct not only errors in judicial proceedings, but also extra judicial errors and misdemeanors tending to the breach of the peace, oppression of the subject to the raising of faction, controversy, debate, or any manner of misgovernment; so that no retort or injury whether public or private, can be committed, but what may be reformed and punished according to the due course of law." Wherever, therefore, any ministerial duty is imposed by the law, the writ of mandamus will lie to all classes of public officers, under those general regulations as to its application, which we have heretofore considered.

§ 31. I. The writ of mandamus will not lie to control the discretion of an inferior officer, for otherwise superior tribunals would draw to themselves all matters of judgment, and officers would in reality have none at all.

Wherever a discretionary power is vested in officers, and they have exercised that discretion, the court ought not to interfere, because they cannot control, and ought not to coerce that discretion. In *John Giles's case*, 2 Str. 881, a mandamus was moved for, to certain justices to grant him a license to keep an ale house; it was opposed, on the ground that it was discretionary in the justices, and the court refused it, saying, there never was an instance of such a mandamus. (Per Spencer J. in *Wilson v. Supervisors of Albany*, 12 Johns. 414, 416. See *Commissioners of the Poor &c. v. Lynah*, 2 McCord, 170.) Therefore, where a mandamus was applied for to compel the supervisors of Oneida, to audit and allow a bill for a surgical operation on a transient pauper, and it was shown in answer to the rule, to show cause that the supervisors had acted on the subject matter, and audited the bill at \$5:—The court denied the application on the ground that the board of supervisors had a discretion by statute which the court could not control. (*Hull v. Supervisors of Oneida*, 19 Johns. 259.) And where the supervisors of a county passed upon the account of a constable for removing paupers and disallowed part, and this writ was moved commanding them to audit and allow the ac-

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count of the relator. Spencer, J. observes: "By the 9th section of the act for the relief and settlement of the poor, (1 R. L. 282,) any constable conveying a pauper from one town to another, is to receive so much money for his services as the supervisors of the county shall judge he reasonably deserves to have, to be raised, &c" "In the present case, whatever may be thought of the reasonableness of the allowance of the supervisors to the applicant, he has no legal right to any particular sum. He has no right to any money for the services performed, but such as the supervisors shall, in their discretion, judge him entitled to." "Certainly not to allow any specific sum; that would be taking upon ourselves a discretion which the legislature have vested in the supervisors; we could only command them to examine the applicant's accounts, and, in the words of the statute, allow him, for his services, such sum as they shall judge he reasonably deserves to have; and this has been already done." The case of *Ex parte Farrington*, (2 Cowen, 407.) was similar. It was an application for a rule commanding the supervisors of Delaware county, to show cause why a mandamus should not issue commanding them to audit and allow an account presented by Farrington for services as a constable. And the supreme court denied the application on the ground that the "amount of the allowance to constable or other person, for serving subpoenas in criminal cases, is a matter of discretion, in the board of supervisors, with which this court will not interfere;" and that the supervisors had not refused to act. Upon the same general principle where commissioners were appointed by an act of the legislature to lay out a road, on the most direct and eligible route, commencing at or near a certain village, and the road was laid out, commencing at the distance of sixty rods from the village, in a field where there was no road with which the new road could be connected, and the route, instead of being the most direct and eligible, was, as expressed by the court, strikingly injudicious; yet, notwithstanding these facts, the court awarded a peremptory mandamus to the commissioners of highways of a town through which the road was laid, to proceed forthwith to open and work the road as laid out by the state commissioners. (*The People ex rel. Case v. Collins, et al.* 19 Wend. 56;) And the supreme court further decided that where the discharge of a duty created by act of the legislature is confided to a special commission, and the duty is in its nature judicial, this court will not collaterally review the doings of the commissioners, and hold as void the final determination made by them in the exercise of their discretion or judgment. Mr. Justice Cowen, who delivered the opinion of the court, considered this principle as applicable to the decisions of all "courts, special tribunals, commissioners and magistrates to whom judicial powers are delegated; such decisions and determinations can be reviewed only by certiorari or writ of error, if no other mode of appeal is given by the statutes creating such courts, &c" In *Chase v. The Blackstone Canal Co.* (10 Pick. 244,) the petitioners whose land was injured by a canal, having applied for a jury and obtained a verdict for greater damages than had been allowed him by commissioners appointed under the statute authorizing the construction of the canal, moved the county commissioners for costs, but the motion was overruled, and he thereupon applied to this court for a mandamus to compel the county com-

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missioners to allow him costs, the court, without inquiring into the correctness of the decision, refused to issue a mandamus, because the county commissioners acted in a judicial capacity upon a question properly submitted to their judgment. And in *Anon.* 2 Pennington, 576.) an application was made for a mandamus, to two justices of the peace, and two overseers of the poor, to compel them to make a certificate for the manumission of a slave. The application was made on the part of the executor, to enable him to comply with the will of his testator. The facts disclosed by the affidavits read, were, that application had been made to the justices and overseers of the poor, who had met, heard the application, and decided against it, by refusing to make the certificate. Upon this state of facts, the court refused the mandamus, saying: "All we can do, is to compel the justices and overseers of the poor, to proceed to the examination of the slave, and to exercise the discretion vested in them by law: it appears that they have done that already." So where the county court, in Virginia, rejected an application for opening a new road, on a regular hearing, it was held, that a mandamus could not be awarded, by the circuit court, to compel the county court to open the road. (*Jones v. Strafford Justices*, 1 Leigh, 584.) Nor will this writ lie to compel county commissioners to accept the report of a committee appointed by said commissioners pursuant to the laws of Maine, (*Proprietors of Kennebec Toll Bridge Petitioners*, 2 Fairfield, 263,) nor to compel the restoration of his office to a professor in the college of William & Mary, in Virginia, (*Bracker v. William & Mary College*, 3 Call, 573;) nor to compel an ordinary to grant letters of administration to a particular person. (*The State v. Mitchell*, Const. Rep. S. Ca. 703, 706. Another ground, however, was considered in deciding this case, viz: that there was a remedy by appeal.) So it has been held in South Carolina, that no mandamus lies to the managers of elections to compel them to declare a candidate elected, because their decision upon questions of election is final and conclusive. (*Grier v. Schackelford*, Const. Rep. So. Ca. 642. See also *The State v. Bruce*, 1 id. 165, where the question is very fully considered.) So where an act of the legislature provides that the county commissioners shall draw an order for the amount of a schoolmaster's bill for educating poor children, if they approve thereof the court cannot compel them by this writ to draw an order; (*Comm. v. The County Comm'rs*, 5 Binney, 536.) Nor will this writ lie to compel the board of property to issue patents for donation lands, if they have deliberated and decided upon the subject, because by the act of the legislature, they are invested with judicial power in that respect; (*Comm. v. Cochran*, 6 Binney, 456;) nor to compel the guardians of the poor to continue in office three of the old managers, (*Respublica v. Guardians &c.* 1 Yeates, 476. See also the general principle under consideration, stated and illustrated in *Griffith v. Cochran*, 5 Binney, 87, and *Comm. v. The Judges of Common Pleas*, 3 Binney, 275.) Nor will mandamus lie to compel commissioners of bankruptcy to give a bankrupt a certificate of conformity, (*Respublica v. Clarkson*, 1 Yeates, 46. See also note to *Ex parte King*, 7 East 91.) An application was made for a mandamus to compel the commissioners to certify the bankrupt's conformity to the acts, to the Lord Chancellor. But the court were of the opinion that the legislature had vested a discretion in the

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commissioners to judge of the bankrupt's conformity or non-conformity, with which discretion they would not interfere, and therefore refused the writ. A mandamus will not lie to the benchers of an inn of court to compel them to call a student to the bar. (*Rex v. Gray's Inn, Benchers of*, Doug. 353;) nor to compel them to admit an individual to be a member of the society, for the purpose of qualifying himself to become a barrister, (*Rex v. Lincoln's Inn, Benchers of*, 4 B. & C. 855 7 D. & R. 351;) nor to the principal and ancients of Barnard's Inn to admit an attorney into the society, (*Rex v. Barnard's Inn (Principal and Ancients of)*, 5 A. & E. 17. See also *Rex v. Street*, 8 Mod. 98, 99;) nor to a judge of assize to compel him to grant a warrant of restitution, where an indictment for forcible entry and detainer had been found by the grand jury under the stat. 8 Henr. vi. ch. 9, and an application was made to him for such a warrant, because it is in his discretion whether he will grant it or not. (*The Queen v. Harland, et al.* 8 Adolph. & Ell. 826.) Upon this general principle, if a corporation have power by their charter to have a town clerk who shall continue *durante bene placito* of the Mayor and Aldermen; by this they have an arbitrary power of turning him out at pleasure, and need not at the return of a mandamus assign any reasonable cause for their conduct herein. (Bac. Ab. tit. mandamus C. Vent. 77, Sid. 461, Lev. 291. *Dighton v. Mayor of Stratford upon Avon*, Raym. 168 S. C. See further *The People v. The President and Trustees of the Village of Brooklyn*, 1 Wend. 318. *The People v. Tracy*, 1 Denio, 617, 619.)

§ 32. In all those cases where the inferior officer has no discretion but where his obligation to do the act which is sought to be enforced, depends upon the circumstances of the particular case, the superior court will enquire into these, and administer the remedy according to the principles of substantial justice. And it may be laid down as a general rule that the superior tribunal will not compel an officer to do an act which would subject him to an action, or which may occasion costs for which he has no means of reimbursement. Thus in *Ex parte Fleming*, (4 Hill, 531,) proceedings had been instituted to compel the satisfaction of a judgment in the manner prescribed by the non-imprisonment act; (Ld. 1831, p. 396, § 3 *et seq.*) After a hearing the judge decided that the debtor was guilty of fraud within § 4, sub. 2 and 3, and determined to commit him in default of his compliance with the terms of § 10. The debtor refused to comply, and the judge signed a warrant of commitment, which, however, he refused to deliver, on the ground that he had been served with an injunction from the district court of the United States, restraining further proceedings. On a motion for a mandamus commanding the judge to deliver the warrant, Cowen, J. who delivered the opinion of the court, remarks: "It is certainly impossible for me on the case stated, to see expressly that this injunction was properly issued, but it is not my duty to enquire whether it was or not. I am not prepared to deny, that under circumstances, it might have been properly issued; but if I were, it is enough to know that Judge Conckling has power to issue and enforce the process of injunction like any other chancellor. If it has improvidently issued, I am bound to suppose that he will set it aside on motion. * * * Before I should be warranted in com-

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selling a ministerial officer to disregard it, I must be satisfied * * * that the ordering of the writ was a mere act of usurpation * * * "I am therefore called upon to order the doing of an act by Judge Lawrence which would be in direct violation of a valid injunction, and subject him to punishment accordingly. It is true that courts of law do not hold themselves restrained by injunction from proceeding; nor should any officer be thus restrained while acting as judge. But no court ought to compel either parties or ministerial officers to put themselves in positive conflict with the order or writ of another court. The motion was therefore denied." (*Bart v. Mapes*, 1 Hill, 649, 651.) So the court will not grant a mandamus commanding justices to do an act which may render them liable to an action; (*Rex v. Buckinghamshire, Justices of*, 1 B. & C. 485. *Rex v. Greame*, 3 A. & E. 615. *Rex v. Morgan*, *ibid.* 616, n.;) and under that principle, a writ was refused to compel a magistrate to enforce a conviction, when it was doubtful whether such conviction was good in consequence of the evidence not having been stated; (*Rex v. Broderip*, 5 B. & C. 239. 7 D. & R. 861;) nor to do that which may occasion costs for which they have no means for reimbursement. Therefore, where a chief constable appointed for one of the divisions of a riding, gave a bond to the clerk of the peace, with condition that he should well and faithfully execute his office; should pay, apply, and account for all sums of money coming to his hands as chief constable of his division, and should in all other respects, perform and observe all such orders and directions as should be made or given to him in respect of his said office. The justices of the riding having ordered a rate to be levied on the inhabitants according to a certain valuation, the constable collected from his division, and paid over to the treasurer, an undue proportion of rate. The justices in sessions resolved that the bond was forfeited, but that no proceedings should be taken upon it. Application being made to this court on behalf of some of the parties aggrieved, for a mandamus to the justices or clerk of the peace, to put the bond in suit, the court refused a rule to show cause. (*In the matter of Lodge*, 2 Ad & Ellis, 123; *Rex v. Justices of Buckinghamshire*, 3 Nev. & M. 68; *Rex v. Justices of Somersetshire*, 1 Harr. & Woll. 82.)

§ 33. And upon the abstract merits of the application, of which as we have seen in the last section, the court must judge when there is no discretion in the inferior officer it has been held that a mandamus will not lie to compel the trustees of a turnpike road to repair it; (*Reg. v. Oxford and Whitney, Road Trustees*, 4 Perr. & D. 154;) and in Pennsylvania, that the supreme court will not issue a mandamus to the county commissioners to pay for the valuation of ground taken up by a road, in pursuance of an order of the sessions. (*Second Street Road*, 1 Y. 155.) So this writ was refused to the commissioners of customs to restore tobacco as wrecked goods, and upon which a lower rate of duty had been tendered. (*Rex v. Commrs. of Customs*, 1 Nev. & P. 536. 5 Ad. & Ell. 380.) So where a criminal information had been filed against a town clerk for misconduct in his office, in the election of councillors of the borough, the court refused this writ to compel him to produce the voting papers in his custody, which had been used at the election. (*Rex v.*

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Nichollatts, 5 Adolph. and Ellis, 376.) So the court refused to issue the writ to a board of guardians commanding them to admit to the office of clerk, a party who alleged he had been elected by a majority of good votes; because they would not thus enquire into the title of the voters. (*Reg. v. Dolgally Guardians*, 3 Nev. & Per. 542.) In Pennsylvania, a mandamus was refused to be allowed to compel the canal company to pay the relators a certain amount of damages, which had been awarded to them in the quarter sessions, on the report of viewers, appointed to assess damages sustained by reason of the Pennsylvania canal, (*The Com. v. The Canal Commissioners*, 2 P. R. 517;) and a mandamus to the commissioners of a county, to draw orders on the county treasurer, was refused, where it appeared by the return to the rule to show cause, that there was no money in the county treasury, applicable to the purpose. (*Com. v. The Commissioners of Philadelphia Co.* 1 Wh. 1.) So in Ohio, mandamus will not lie against a county auditor for refusing to audit an assistant appraiser's account, which has not been finally passed upon by the county commissioners. (*Burnett v. The Auditor of Portage County*, 12 Ohio R. 54.)

§ 34. Let us now proceed to consider the cases wherein the writ of mandamus has been adjudged to lie to inferior officers. And

I. It lies wherever such officer has a discretion to compel the exercise thereof, though not to determine the particular mode of such exercise. Therefore in *The People v. The Supervisors of Albany*, (12 Johns. 414, cited *supra*, § 31) the court say, had the supervisors refused to hear the application of the relator, and to examine and pass on his account a mandamus would have been proper to compel them to do so. The reason of this rule has been mentioned in its application to inferior tribunals and judicial officers, and it is therefore unnecessary to do more than call the attention of the reader to the following cases. (*Hull v. The Supervisors of the County of Oneida*, 19 Johns. R. 259, 262. *Anon.* 2 Pennington, ed. 1835, 431. *Ex parte Farrington*, 2 Cowen, 407, 408. In the matter of *Bright v. Supervisors of Chenango*, 18 Johns. R. 242. *Rex v. Barber*, 6 Adolph. & Ellis, 388. See also *Grier v. Schackleford*, 2 Tr. Con. Rep. 642. *Ex parte Jennings*, 6 Cowen, 518; and see other cases *infra* § 37.)

§ 35. II. Subject to the general rules we have before considered, (§ 5-16) and to the essential consideration that public justice demands the application of the remedy, this writ will lie as Mr. Graham has well expressed it, (*Practice*, 3d ed. vol. 1. p. 319,) wherever "the act required to be performed by a public officer is ministerial in its character, involving a direct duty imposed upon him by law."

§ 36. There are cases as Mr. Graham observes, (*Practice* 3d ed. vol. 1. p. 321,) where a private individual acts in a quasi public character, as for instance under the authority and sanction of a public statute, and in these cases a mandamus may be resorted to, to compel him to perform a duty consequent upon that relation. There is no difference in principle between such an individual and a public officer—both have public functions to perform, the neglect

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or misconduct of which would be fraught with mischief to the community. Therefore, where a reference to arbitration had proceeded under the statute, a mandamus was granted, to the arbitrator under it, to appoint an umpire; (*The King v. Goodrich*, 3 Smith, 338; *The King v. Inhabitants of Washbroote*, 7 D. & R. 221; Tidd, 9th ed. 844;) though, except in cases of arbitration founded upon some statute, or where the written submission to arbitration has been made a rule of court, under the general arbitration act, the proceedings would be regarded as a mere private transaction between the parties, in respect of which no writ of mandamus could issue. (1 Chitt. Gen. Prac. 805) And a mandamus was granted by Nelson, Ch. J. on behalf of a non-resident, to compel the trustees to appoint referees in pursuance of the statute, in order to contest the validity of the debts presented and claimed by attaching creditors. (*Titus v. Kent*, 1 How. Sp. T. Rep. 60.) So where under a canal act, the arbitrators were required to appoint an umpire it was held that mandamus would lie to compel the appointment as therein enjoined. (*Rex v. Goodrich*, 3 Smith, R. 388.) A number of cases arranged after the plan of Mr. Chitty, (1 Genl. Prac. 729 *et seq.*) which is believed to be the most convenient to the profession, are presented in the next section.

§ 37. *Particular Cases of the application of Mandamus to Inferior Courts and Officers.*

Accounts.—See County Courts, Overseers, Supervisors.

Admission.—See Commissioner's Office.

Appraisers.—See Commissioners.

Arbitrators.—See *supra*. § 36.

Attorney.—See *supra*. § 28. *Infra*. tit. Office. In most, if not all of the United States, the right to admit attorneys and counsel is exercised by the courts, and considered a judicial duty.

Backing Warrants.—See Justices.

Bank.—A board of directors of a bank have no right to pass a resolution excluding one of its members from an inspection of its books, although they believe him to be hostile to the interest of the institution; and it was accordingly held in this case, where the cashier of a bank had refused to permit a director to inspect the discount book, that a mandamus lay, commanding the cashier to submit the book to his inspection, although the conduct of the cashier had been approved by a resolution of the board. It was also held that the mandamus might properly be directed to the cashier, and need not be directed to the board; the court, however, intimating that as notice had been given to the directors, there would be no impropriety in directing the writ to them as well as to the cashier. (*The People ex rel. Muir v. Throop*, 12 Wend. 183.) See *infra*. Corporation. *Supra*. § 5, Authorities there cited.

Bankrupts.—See Commissioners.

Barrister.—See *infra*. tit. Office.

Books and Documents.—The writ issues to compel a removed clerk to deliver up books of a public corporate company; (*Rex v. Wildman*, 2 Stra. 879.)

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and to compel overseers to deliver up parish books to their successors, (*Rex v. Clapham*, 1 Wils. 305, post.) but it was refused to new churchwardens against the old, on the ground that the right might be tried by an issue at law; (*Rex v. Street*, Mod. Cas. 98; and see *Anon.* 2 Chit. R. 255;) and in the case of a vestry clerk, he might maintain trover; (*Anon.* 2 Chit. R. 255, G. P. 810;) nor will it lie to compel an attorney and steward to deliver up documents. (*Cocks v. Harmer*, 6 East, 404.) Though, at the instance of the lord of the manor, or of the judge of a court, a mandamus might issue to compel the steward or officer to deliver up the court roll, records, and proceeding, because the immediate production of them might be essential to the public. (*Rex v. Ingram*, 1 Bla. R. 30; *Hughes v. Mayre*, 3 T. R. 275; *Corpus Christi College*, 6 Taunt. 105, S. C.; *Rex v. Erle*, 2 Burr. 1197; and see *Rex v. Huleton*, 1 Stra. 621; *Marshall's Case*, 2 Bla. 912; *Ex parte Grubb*, 5 Taunt. 206. Tidd, 9th ed. 87. See Postmaster General.)

Bridges.—See County Court.

Canal.—See Commissioners.

Chancery.—In Virginia the stat. 1825-6 was intended to prevent unreasonable and causeless delays in chancery suits; and the 14th section authorizes the court of appeals to award a mandamus to the chancery court, to compel them to hear causes at the first term at which they are prepared for hearing, when no special cause appears for the refusal of the court to hear them; but does not authorize a mandamus to compel a hearing of a cause, which, for reasons satisfactory, the chancery court continues. (*Richardson's Case*, 3 Leigh, 343.)

Churchwardens.—(1 Chitt. Genl. Prac. 793, 802. *Rex v. Simpson*, Selw. N. P. mandamus 1062, n. 1; *Anon.* 1 Ventr. 115; *Anon.* 1 Str. 686; *Rex v. Wix* 2 Barn. & Adolph. 196; *Rex v. Clear*, 4 B. & Cresw. 899, 7 D. & R. 393; *Rex v. Smallpiece*, 2 Chitt. R. 288; *Ledesdon v. Exeter*, 1 Chitt. Genl. Prac. 802, n. (d); *Rex v. Woolly*, 2 Str. 1259, Burns Just. Poor, 44; *Rex v. Canterbury*, 1 Bla. R. 667, 4 Burr, 2290.)

Citation.—See Clerks.

Clergymen.—Every endowed minister of any sect or denomination of Christians, who has been wrongfully dispossessed of his pulpit, is entitled to the writ of mandamus to be restored to his function, and to the temporal rights with which it is endowed. (*Runkel v. Winemiller*, 4 H. & MoH. 429. See the act of 1828, ch. 78.) The office or function of a minister must be endowed, or a mandamus to restore cannot be granted. Endowment does not necessarily mean that land and tithes must be annexed to the living; but a stipend, rents, emoluments and advantages of any kind, given and secured to the minister, during the time he shall officiate as minister, is an endowment. (*Ibid.*) On the application of the Rev. M. R. to be restored to the office of minister of the High Dutch Reformed Christian Church in F. it appeared that according to the mode of electing a minister by the constitution of the church, the congregation applied to the Synod of Pennsylvania for a minister to supply the place of the predecessor of R. who had left the church, that the Synod recommended R. who was approved and regularly inducted into the office of minister of the church, and became entitled by contract to

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the emoluments of the office, and remained in possession thereof until forcibly dispossessed by the defendants. According to the proof, the Synod was composed of ministers of the High Dutch Reformed congregation in the U. S. and no person could, by the rules of the church, be appointed as a preacher but one of the Synod, and one who was regularly ordained. Held, that these facts afforded sufficient *prima facie* evidence that R. was a member of the Synod, and was regularly ordained. And held, that R. was entitled to a mandamus to be restored his office. (*Ibid.*)

Clerks.—The writ lies to a clerk of a court or county to compel him to swear in one who has been appointed commissioner of deeds, and he is not at liberty to refuse on the ground that the person is incapable of holding the office, as that he is a minor or alien, or that the appointment has been improvidently made; (*People ex rel. Dobbs v. Dean*, 3 Wend. 438.) So mandamus lies to compel a town clerk to deliver the records to his successor in office, if he refuse so to do on the application of his successor, and his showing himself to be clerk. (*Taylor v. Henry*, 2 Pick. 397. *Commonwealth v. Athearn*, 3 Mass. 287.) So a mandamus was issued from the provincial court to the clerk of a county court, (who had been legally removed from office,) to deliver up the records and seal of the court to the secretary of the province. (*Bordley v. Lloyd*, 1 H. & McL. 27.) So the writ will lie from the superior court, in Georgia, to the clerk of the court of ordinary, compelling him to issue a citation in the usual form to the creditors and kindred of an intestate, to show cause why an applicant for administration, *prima facie* entitled, should not receive letters of administration. (*Ex parte Carnochan*, Chanc. 215.) The writ of mandamus is the proper remedy to restore a clerk ousted from his office by the illegal appointment of another person. (*Deu v. The Judges of Sweet Springs District Court*, 3 Hen. & Munf. 1.) The person occupying the office ought to be made a party to the rule, or to the conditional mandamus, or such rule or mandamus ought to be served upon him, so as to enable him to defend his right before the peremptory mandamus issues. But, if it appears from the record that he was apprised of the proceedings and defended his right, it is sufficient. (*Ibid.*) If the original rule be to show cause wherefore a mandamus shall not issue to admit the clerk, the subsequent rule, or the mandamus founded thereon, may nevertheless be to restore him to the said office; for such rules may be changed and modified so as to square with the rights of the parties, and attain the real justice of the case. (*Ibid.*)

College.—See Warden.

Commissioners.—The writ has been held to lie:—to commissioners of bankrupts, as to compel them to issue their warrant for a further examination of the bankrupt, (*In re Bromley*, 3 D. & C. 310, though not to grant a certificate of conformity. See *Ex parte King*, 7 East, 92, *supra* § 31) to canal commissioners as where the waters of the Chitteningo Creek were diverted from a mill and other works, on that creek, to feed the Erie Canal; the mill-owner claimed under a grant from the state, bounded on the margin of the creek; he applied to the canal commissioners to appraise his damages, but they refused on the ground that he had no title to the creek. Held, that a

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mandamus should issue, ordering them to appraise. (*Ex parte Jennings*, 6 Cow. 518.) So it lies to compel the county commissioners to issue their warrant for empannelling a new jury, whose one jury has already been summoned and acted, without being able to agree in locating a highway. (*Mendon v. Worcester*, 10 Pick. 235;) to commissioners of excise, as when it is the duty of an officer of the excise to grant, and he should refuse, a permit to remove wine, the court would compel the delivery of a proper permit. (*Rex v. Commissioners of Excise*, 2 T. R. 381; *Rex v. Cookson*, 16 East, 376; *Rex v. Commissioners of Liverpool*, 2 Maule & S. 223;) to commissioners of highways as to compel commissioners of highways in New York to open a road laid out by the judges of the court of common pleas, on an appeal to them from the refusal of such commissioners to lay out the road. (*People v. Champion*, 16 Johns. 61;) so to compel them to lay out or discontinue a road; (*People v. Commissioners of Salem*, 1 Cowen, 23;) or to open and work a road; and it will be granted without regard to the near approach of the expiration of their offices; for when the term of office expires, their successors must obey the command of the writ; (*People ex rel. Case v. Collins*, 19 Wend. 56;) to commissioners of the land tax to compel them to elect a clerk; (*Rex v. Commissioners of Westminster*, 1 T. R. 146;) or to swear him in and admit him; (*Rex v. Thatcher*, 1 Dowl. & Ryl. 426;) to commissioners of poor, and the constitutional court of South Carolina may, by writ of mandamus, direct the commissioners of the poor to discharge the duties imposed on them by act of assembly, if they fail so to do; (*Commissioners v. Lynah*, 2 M'Cord, 170; See *Overseers, Poor*;) to commissioners of sewers where they are bound to repair, though the writ would not be granted on the application of the owner of marsh lands who was himself obliged to repair and whose neglect caused an inundation; (*Rex v. Commissioners of Sewers*, 1 Barn. & Cresw. 477; 2 Dowl. & Ryl. 700;) to commissioners of taxes, to re-assess the inhabitants upon default made by the collector, it being the duty of the officer and the inhabitants to take care that the money paid for taxes finds its way into the treasury. (*In re Woolton*, 6 Price, 103.)

Committee.—A mandamus will be granted, in New Jersey, to compel a township committee to assign a road to the overseers of the highways. (*Anonymous*, 2 Halst. 192.) But the rule served upon the committee must specify the object required to be done with sufficient particularity. (*Ibid.*)

Common Pleas.—In New Jersey, a mandamus will lie to the court of common pleas to make an appointment of surveyors, to vacate a road which has been laid out and recorded, though never opened, where, after a proper application, they have refused to make such appointment. (*State v. Judges*, 4 Halst. 246.)

Constable.—(See *Rex v. Manchester*, 1 Dowl. & R. 454. See *County Auditor*.)

Corporations.—See *infra*, § 38, *et seq.*

Counsellor.—See *supra*, tit. Attorney.

County.—See *Commissioners*.

County Auditor.—A mandamus it seems is the proper remedy to compel a County Auditor to issue an order for constable's fees, where he is entitled to

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them by law; (*Smith v. The Commissioners of Portage County*, 9 Ohio R. 25;) but it will not lie against this officer, for refusing to audit an assistant appraiser's account, which has not been finally passed upon by the county commissioners. (*Burnett v. The Auditor of Portage County*, 12 Ohio R. 54.)

County Court.—Where the county court refuses to draw their warrant on the treasurer of the county, directing him to pay an account which has been allowed by the circuit court to the clerk of said court for office rent, a mandamus is an appropriate remedy to compel them to do so. (*Boone v. Todd*, 3 Min. 140.) So a mandamus lies from the superior court of Virginia to a county court, to compel such court to build a bridge or causeway, according to the section of the act of assembly concerning public roads. (*Commonwealth v. Justices*, 2 Virg. Cas. 9.) A return to such mandamus, by the justices, that the convenience of the people does not at that time authorize the heavy burden which will be imposed by the erection of such bridges, &c. is insufficient, because it does not directly deny the necessity of the bridges, or aver that the surveyor, or his assistants, could make or maintain the same. (*Ibid.*) Such return, being insufficient, should not be traversed, because the matter of the return should not be put in issue, and therefore the traverse should not be received. (*Commonwealth v. Justices*, 2 Virg. Cas. 9.) So where bridges or causeways are necessary within the limits of a county, and the surveyor of the road, with his assistants, cannot make or maintain the same, the superior court of law for such county hath the power to compel the justices, by writ of mandamus, to build or repair such bridge or causeway. (*Ibid.* 499. *Brander v. Chesterfield Judges*, 5 Call, 548.) Where the county court, in Virginia, rejected an application for opening a new road, on a regular hearing, it was held, that a mandamus could not be awarded, by the circuit court, to compel the county court to open the road. (*Jones v. Stafford Justices*, 1 Leigh, 584.) Mandamus does not lie for the builder of a public bridge, to compel the county court to levy the proportion of the price of the bridge chargeable upon the county; a specific remedy being given him, by statute, to recover the same by action of debt against the justices refusing to levy it. (*Justices v. Munday*, 2 Leigh, 165.) The superior court will not grant a mandamus to compel a county court to issue a pluries attachment against the body of a garnishee, who had been taken on the *alias*, and discharged by a judge of the general court under a *habeas corpus*. (*Jackson v. Justices of Harrison*, 1 Virg. Cas. 314.) Mandamus to compel county court to record deed of emancipation. (*Manns v. Givens et als.* 7 Leigh, 689.) The circuit court will, by mandamus, compel the county court to settle and allow all claims against the county, and to levy a tax for their liquidation, if it refuse. (*Madison Court v. Alexander*, Walk. 523.)

Court.—See Inferior Court.

Court Levy.—A mandamus will not issue to compel a levy court to levy a sum of money, after the time prescribed by law for making it has passed. (*Ellicott v. The Levy Court*, 1 H. & J. 359.) Cause shown by the justices of the levy court why a mandamus should not issue against them, to levy a sum of money claimed by the sheriff for poundage and other fees, for execu-

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ting sundry writs for the use of the justices of the levy court. (*Howard v The Levy Court of A. A. County*, 1 H. & J. 538.)

Court of Sessions.—In Massachusetts, a mandamus may be awarded to compel the court of sessions in each county to erect or provide a suitable house of correction. (*Commonwealth v. Hampden*, 2 Pick. 414;) and also to compel the court of sessions, that, improperly and without good cause, rejects the verdict of a jury summoned and empanelled to estimate the damages occasioned to any person by the laying out of a highway, to do right and accept the verdict. (*Commonwealth v. Norfolk*, 5 Mass. 435. *Commonwealth v. Middlesex*, 9 ib. 388.)

Dead Body.—See Jailor.

Deeds.—See Clerk, Inferior Court, Mayor, Register of Deeds.

Ecclesiastical Court, officers and persons.—A mandamus lies to compel the ecclesiastical judge to grant probate to the executor named in a will; (*Anon.* 1 Vent. 335; *Anon.* 1 Stra. 152; *Dunkin v. Man*, Sir T. Raym. 233; *Offey v. Best*, 1 Lev. 186; *Rex v. Inhabitants of Hursley*, 8 East, 408;) or letters of administration to the husband of his wife's estate, unless the husband has done something to part with his right; (*Rex v. Bettenworth*, Stra. 891, 1118;) and a mandamus for administration to the next of kin may be granted, notwithstanding a suit depending, if his consanguinity be not denied; (*Rex v. Hay*, 4 Burr. 2295; *Rex v. Dr. Hay*, 1 Bla. R. 640.) But when the validity of a will has been contested in the spiritual court, and a suit is still depending there concerning it, the court will not then grant a mandamus to the judge of such court to grant a probate to any particular person. (*Rex v. Hay*, 4 Burr. 2295; *Lovegrove v. Bethell*, 1 Bla. Rep. 68.) Nor will the court compel the grant of administration *durante minore ætate*, for the law has not decided who is entitled to such administration, and we have seen that a mandamus only issues to enforce a legal right. (*Smyth's case*, 2 Stra. 892. See 1 Chitty's Genl. Prac. 806, 799. See in general Selwyn's N. P. tit. Mandamus, 11; Harrison's Index, Mandamus, 6. *Rex v. Chester*, 1 T. R. 396. *Ante*; but see *Clark v. Sarum*, 2 Stra. 1082. *Rex v. Bloer*, 2 Burr. 1043. *Rex v. London*, 13 East, 420; 1 T. R. 331; *Rex v. Field*, 4 T. R. 125. *Rex v. Barker*, 3 Burr. 1265; 1 Bla. R. 300, 352, S. C. *Rex v. Jotham*, 3 T. R. 575. *Anon.* 2 Chit. R. 254; *Rex v. Harris*, 3 Burr. 1420; C. G. P. 793. *Id.* *ibid.*; *Rex v. Warren*, Cowp. 379. *Rex v. St. James's*, Cowp. 413; *Rex v. King's Clere*, 2 Lev. 18; *Ile's case*, 1 Vent. 143; Selw. N. P. Mandamus, 11. n. *Rex v. Canterbury*, 8 East, 215; see other cases as to clerical persons, Impey, Mandamus. 103 to 106.)

Highway.—See Commissioners, Committee, Common Pleas, County Court, Overseers, Selectmen.

Inferior Court.—Every inferior jurisdiction, whether created by a public or a private law, is subject to have its proceedings inspected, either by appeal or by certiorari and mandamus, where such jurisdiction acts judicially; they will be coerced to perform their duties, and restrained and confined within their proper limits as prescribed by law. (*Williamson v. Carnan*, 1 G. & J. 184, per Baltimore County Court.) Therefore where an inferior court of record, in Virginia, improperly refused to admit a deed to be proved and re-

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corded, it was held, that it might be compelled to do so by a peremptory mandamus. (*Dawson v. Thurston*, 2 H. & M. 132.) It is a matter of right in the defendant, who is a non-resident of a state, and is sued in a state court, to remove the cause to the circuit court of the United States for such state, on complying with the terms prescribed by the act of congress; and if the inferior court refuse to allow the removal of the cause, it may be compelled by mandamus, emanating from the superior court of the state, not from the circuit court of the United States. (*Brown v. Crippin & Wise*, 4 Hen. & Munf. 173.) *Quære*: Whether a mandamus lies from a superior court of chancery to a county court, compelling the justices to hear and determine a cause, when there appears to have been unreasonable delay? (*Webb v. Barbour*, 4 Hen. & Munf. 462.) When it is a duty to hold a court for the benefit of suitors, it may be enforced by mandamus, (*Rex v. Eastings*, 5 Bar. & Ald. 692; 1 D. & R. 148; *Rex v. Havering*, 2 D. & R. 176, n.; 5 B. & C. 691; and this even as to the place of holding; (*Rex v. Ilchester*, 2 D. & R. 727; *Rex v. Grantham*, 1 Wils. 716; and see C. G. P. 795, tit. Inferior Courts, &c;) and the writ may be issued to compel the holding of a copyhold court, to accept a surrender. (*Rex v. Boughey*, 1 Bar. & Cren. 565. 1 Chitty's Genl. Prac. 794, 795.)

Jailer.—Where a debtor died in prison, and the jailer refused to deliver the body to his friends for interment, until a claim was paid, the court ordered a peremptory mandamus to issue. (*Wakefield bailiff, Ex parte* 1 Gale & Dav. 566.)

Justices.—If the justices omit from their nomination to the executive for the appointment to the office of sheriff, the name of any particular justice, a mandamus will not lie to compel them to make such nomination; for in the exercise of this discretionary power, they cannot be controlled by the superior courts (*Frisbie v. Justices of Wythe*, 2 Virg. Cas. 92.) The removal of a justice with his family from his county to another, and remaining out for several years, is neither an abandonment or virtual resignation, or forfeiture of his office, and whether void or only voidable by a judicial proceeding, eventuating in a judgment of amotion, no mandamus ought to issue to invest the applicant with an office not belonging to him if void, or which might be taken from him if voidable. (*Chew v. Justices of Spottsylvania*, 2 Virg. Cas. 208.) Whether the acceptance of the office of deputy clerk of a county court vacates the office of justice or not, the superior court will not grant a mandamus to compel the county court to admit the applicant to an office not belonging to him if void, or which might be taken from him if voidable. (*Amory v. Justices of Gloucester*, 2 Virg. Cas. 523.) Mandamus lies from circuit court, to compel justices of the peace to administer the oath of insolvency, and to order the insolvent's discharge. (*Harrison v. Justices of Norfolk*, 2 Leigh, 764.) A writ of mandamus lies to compel the backing of a warrant in another county, the duty being ministerial and imperative; (*Rex v. Kynaston*, 1 East, 117.) See Overseers. (See also 1 Chit. Genl. Prac. 801. *Rex v. Sparrow*, 2 Stra. 1123; Burn's J. Poor, 24, 25; *Rex v. Norwich*, 1 Bar. & Adolp. 313; what must be sworn, *Rex v. Bedfordshire*, Cald. 157; and *Rex v. Peterborough*, id. 238. *Rex v. Stafford*, 1 Stra. 512. *Rex v. Wilt-*

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shire, 1 Wils. 138; *Rex v. Horton*, 1 Term R. 374. *Rex v. Salop*, 3 B. & Adolp 910.)

Jury.—See Commissioners.

Lord and Stewart of a Manor.—To compel an admission to copyhold. See 1 Chitty's Genl. Prac. 794. (*Rex v. Robinson*, 2 Smith's Rep. 274; Dick. Secs. 590, 3d edit.; and 3 Geo. 4, c. 23, s. 3, aids defects in form. *Rex v. Rennett*, 2 T. R. 197; *Rex v. Brewsters' Company*, 3 B. & Cres. 172; 4 D. & R. 492, S. C.; C. G. P. 351, and 794, note (h). 1 Mad. Ch. Pr. 253, 254; *Moor v. Huntingdon*, Nels. 12; Co. Copl. sect. 39. *King v. Coggan*, 6 East, 431; 1 Mad. Ch. Pr. 254. 1 Wm. 4, c. 21, s. 8.)

Magistrate.—In Virginia, a mandamus lies to compel the magistrates, to whom an execution debtor has applied to have the oath of insolvency administered to him, to administer such oath, and order the debtor's discharge. (*Harrison v. Emmerson*, 2 Leigh, 764.)

Mayor.—After a charter election in the city of New York, the inspectors of the sixth ward certified thus: "We have received returns from the several districts of the said ward, &c., copies of which returns certified by us are hereunto annexed. It is impossible for us to declare what persons were, by the greatest number of votes, elected, by reason of lawless violence committed upon the inspectors of the first district &c. and the dispersion of the ballots before they were counted," &c. The ward was composed of four districts, three of which had made regular returns, exhibiting the names of the candidates and the number of votes given for each, and copies of these were annexed to the above certificate; but the first district made no return save a statement of the affair which led to the dispersion of the ballots, giving this as a reason why no return could be made. The returns from the other districts, however, showed an election, and it did not appear that the votes given in the first district could have changed the result. Held, that the persons thus appearing to have been elected officers of the ward, were entitled to qualify as such; and a mandamus was granted commanding the mayor to administer the oath of office to them. (*Ex parte Heath and others*, 3 Hill, 42.) The writ also lies to the mayor of a corporation to admit an apprentice to his freedom, when he has a right by service, although he had broken his covenant not to marry; (*Townsend's case*, 1 Lev. 91. See T. Raym. 69;) so the writ lies to compel the enrolment of indentures in proper cases but not otherwise. (*Rex v. Marshall*, 2 T. R. 2.)

Oath.—See Clerk, Commissioners, Magistrate, Overseers.

Office.—In general it may be laid down as a rule, that where a man is refused to be admitted or wrongfully turned out of any office or franchise that concerns the public, or the administration of justice, he may be admitted or restored by mandamus; (Bac. Ab. tit. Mandamus, c. 1. 11 Co. 93; *Bagg's case*, 2 Sid. 112. Same rule laid down by Glyn, Ch. J.;) if no other adequate specific legal remedy exist. (See *supra*, § 13.)

1. The office must concern the public, (Bac. Ab. tit. Mandamus, C. *Bagg's case*, *ut sup.* *Anon.* 2 Ld. Raym. 989.)

Therefore a writ of mandamus will not lie to try the title to a mere public employment at the will of the executive, or other public functionary, as the

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captain of the magazine guard; (*State ex rel. Gruber v. Champlin. Same v. Hunt, et al.* 2 Bailey 220;) nor to restore a professor to his office in the College of William and Mary, in Virginia; (*Bracker v. William & Mary College*, 3 Call, 573;) nor to restore a town clerk whose office is *durante bene placito* of the Mayor and Aldermen; (Bac. Ab. tit. Mandamus, C. 1. Vent. 77, Sid. 461, Lev. 291, Raym. 188;) nor to the benchers of one of the inns of court to admit a person as a member or student, nor to call him to the bar so as to enable him to practice as a barrister; (*Rex v. Gray's Inn*, Dougl. 353; *Wooler's case*, 4 B. & C. 855;) the only mode of relief is by appeal to all the judges. In the case of D. W. Harvey there was such an appeal, but it was unsuccessful; (and see *Rex v. Gray's Inn*, 1 Dougl. 353;) nor to the College of Physicians to examine a party so that he may be admitted a fellow of the college; (*Rex v. College of Physicians*, 7 T. R. 232;) nor to admit an attorney, that being discretionary in the judge who examines him, and the only remedy is petition to the court. (2 Geo. 2, c. 23, secs. 2 to 6; 23 Geo. 2, c. 26, s. 15; 3 Bar. & Adolp. 770; 10 B. & Cres. 511. See 1 Chitty's Genl. Prac. 798. *Rex v. Furrington*, 4 Dowl. & R. 735; *Giles's case*, Stra. 811; *Rex v. Nottingham*, Say. Rep. 217; *Rex v. Storrey*, 5 Dowl. & R. 308.)

But whenever the office, whether it be temporal, ecclesiastical, or otherwise, is legal and public, or fixed and permanent, by statute, charter, or usage, then this writ lies to swear in, admit, or restore a party entitled to the same. Upon this principle in Maryland, every endowed minister, of any sect or denomination of christians, who has been wrongfully dispossessed of his pulpit, is entitled to the writ of mandamus, to be restored to his function, and the temporal rights with which it is endowed. (*Runkel v. Winemiller*, 4 Har. & M'Hen. 429. *Aliter*, if the office is not endowed. *ib.*;) and so in South Carolina, a mandamus will lie to restore to his office an inspector of tobacco, removed by an irregular summary proceeding. (*Singleton v. Commissioners*, 2 Bay, 105.) Hence mandamus is the proper remedy to restore a clerk ousted from his office by the illegal appointment of another person. (*Den v. Judges*, 3 H. & M. 1.) If the original rule was, to show cause why a mandamus should not issue to admit the clerk, the subsequent rule, or the mandamus founded thereon, may nevertheless be, to restore him to said office. (*Ib.*) The person occupying such office ought to be made a party to the rule, or such rule ought to be served upon him, so as to enable him to defend his right, before the peremptory mandamus issues. If, however, it appears from the record that he was apprised of the proceedings, and defended his right, it is sufficient. (*Ib.*) And a peremptory mandamus will issue to a county commissioner's court, to compel them to restore a clerk, the cause of whose removal is not stated on their records. (*Street v. Gallatin County Commissioners*, Breese, 25.) So a mandamus lies to admit or restore a town clerk; (Bac. Ab. tit. Mandamus, C. 1. Noy. 78, Style 457;) mayor, alderman, burgess, common councilman, freeman or other person, member of a corporation; (*id.* 11 Co. 94, 2 Balet. 122, Style, 299, 457, Raym. 12, 431, 437, Vent. 302. Cro. Jac. 450;) recorder, (*id.* Style, 452, Vent. 143, 153, 4 Burr. 1999;) clerk of the peace, (*id.* 4 Mod. 31, Show. 282, 12 Mod. 13;) or constable (*id.* 2 Roll. 82. Roll. Abr. 535. Salk. 175. See *Strong, petitioner*, 20

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Pick. 484.) In general if the office is acquirable by purchase, and an oath of office, as well as oaths to government are administered, it will be presumed to be public; and on that ground a mandamus was granted to restore a party to the office of clerk or surveyor to the city works; and this writ was issued to restore the treasurer of the New River Company, for though it was but a private corporation, yet it was created by the king's letter-patent. (*Id.*; *Anon.* 1 Stra. 696, S. P.; *Rex v. London*, 1 Lev. 123; Sid. 169; 3 Mod. 334, S. C.; but see the last report, which shows it was rather experimental.)

II. As we have seen before, mandamus will not lie to admit or restore to an office, if there be another remedy. As in the case of *Rex v. Bishop of Chester*, (1 T. R. 404, cited *supra*, § 13. See also *Powel v. Milbank*, cited *supra*, § 12. *Rex v. Turner*, *id.*;) where *quare impedit* lay. Therefore, where one claims an office to which he alleges he is duly elected, while another is holding it by color of right, this writ will not lie, because there is a remedy by *quo warranto* or information. (*People v. The Corporation of the City of New York*, 3 Johns. Cas. 79,) by one of which proceedings the person in possession ought first to be ousted. (*Rex v. Bankes*, 3 Burr. 1454. *Rex v. Cambridge*, 4 Burr. 2011. *Rex v. Bedford*, 1 East, 80. *Rex v. Truro*, 3 Barn. & A. 592.) But where a mandamus presents the only specific or convenient mode of trying the right to an office, it may be employed. Therefore mandamus was granted to a corporation to admit and swear in one who appeared upon the affidavits to have the greater number of legal votes, notwithstanding another had been admitted and sworn into the office, there being no other specific, or at least no other such convenient mode of trying the right. (*Rex v. Bedford Level*, 6 East, 536; and see *Rex v. York*, 4 T. R. 699.)

As to mandamus to admit corporate officers, see further *infra*, § 42, *et seq.*

As to mandamus to admit ecclesiastical officers and persons, see 3 Steph. N. P. 2309, 2310, 2311; Selwyn's N. P. tit. Mandamus, II; Harrison's Dig. tit. Mandamus, vol. 2, 1479, tit. Ecclesiastical Law, *id.* 952; Bac. Ab. tit. Mandamus, c. 1, 2; Com Dig. Mandamus, 1 Chitt. Genl. Prac. 799; and *Rex v. Chester*, 1 T. R. 396; *Clark v. Sarum*, 2 Strange, 1082; *Rex v. London*, 13 East, 420, 1 T. R. 331; *Rex v. Field*, 4 T. R. 125; *Rex v. Bloer*, 2 Burr. 1043; *Rex v. Greame*, 2 A. & E. 615; *Justices of Bucks*, 3 N. & M. 68; *Rex v. Barker*, 3 Burr. 1265. 1 Bla. R. 300, 352; *Rex v. Bishop of Ely*, 8 B. & C. 112; *Rex v. Jotham*, 3 T. R. 575; *Anon.* 11 Mod. 137; *Rex v. Hay*, 4 Burr. 2295. 1 W. Bl. 640; *Anon.* 2 Chit. 254; *Rex v. Harris*, 3 Burr. 1420; *Rex v. Archbishop of Canterbury*, 8 East, 213; *Rex v. St. Margaret's Westminster*, 4 Maule & Selw. 250; *Rex v. Thetford*, 5 T. R. 364; *Rex v. Coleridge*, 2 Barn. & Ald. 806. 5 Dowl. & Ryl. 602. 1 Chitt. 588; *Rex v. Warren*, Cowp. 370; *Rex v. St. James*, Cowp. 513; *Rex v. King's Clere*, 2 Lev. 18; *Ile's case*, 1 Vent. 143; *Rex v. Churchwardens of Westminster*, 4 M. & S. 250; *Rex v. Exeter*, 2 East, 462; *Rex v. Coleridge*, 2 B. & A. 806; *Ex parte Blackmore*, 1 B. & Ad. 122. See other titles of this section.

It has been made a question, what removal or turning out of an officer will entitle him to a mandamus, and it seems to be the better opinion, that one

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who is suspended, may have the writ as well as one who is totally removed, because were it otherwise, they might always suspend, and thereby not only effectually keep him out, but also deprive him of all remedy or redress. (Bac. Ab. tit. Mandamus, C. 3 Lev. 162, Keb. 868. *The King v. Men of Guildford*, Raym. 152 Vide *The King v. The Free Fishers of Whitstable*, 7 East, 353. *Dr. Goddard v. College of Physicians*, Keb. 75, 84.) But where a corporator who was entitled to share in the profits of a fishery, which the corporators worked in partnership, was suspended from the perception of the profits, until he paid a fine imposed by a by-law; the court refused a mandamus to restore him to office, since he was not put out, but only deprived of its profits, for which he might have a remedy by action, if unlawfully suspended. (*The King v. The Free Fishers of Whitstable*, ut supra.* See also *Delacey v. Neuse Riv. Nav. Co.* 1 Hawks, 274; *Fuller v. Plainfield Academic School*, 6 Conn. 532; *Street v. Gallatin County*, Breese, 25; *Taylor v. The Commonwealth*, 3 J. J. Marsh. 306; *Hardin County Court v. Hardin*, Peck's R. 291.)

Overseers.—In New Jersey, a mandamus will be granted against an overseer of a highway, to compel him to open, clear out and make a certain road within the limit and division assigned to him by the township committee. (*The State v. Holliday*, 3 Halst. 205.) So it will be granted to compel overseers of the poor, to deliver up parish books to their successors. (*Rex v. Clapham*, 1 Wils. 305.) A mandamus lies to the overseers to make a rate, (*Luddleston v. Exeter*, Fol. 18; *Rex v. Edwards*, 1 Bla. Rep. 637; *Rex v. Fisher*, Sayer's R. 160;) the rule for which is absolute in the first instance, for otherwise the poor might starve. (Id.) So it lies to overseers and guardians to pass their accounts; (*Rex v. Warwickshire*, 2 Dowl. & Ry. 299;) to justices to swear an overseer to his accounts; (*Rex v. Middlesex*, 1 Wils. 125, accord., but see per Lord Tenterden, in *Rex v. Essex*, 3 Bar. & Adolp. 943;) or to proceed to pass overseers' accounts; (*Rex v. Townsend*, 1 Bott, 305;) or to levy the balance of the overseers' accounts;) (*Rex v. Somersetshire*, 2 Stra. 992; 2 Sess. Cas. 283; *Rex v. Pascoe*, 2 M. & S. 343;) or to hear a complaint against overseers for not delivering a full account; (*Rex v. Worcestershire*, 3 Dowl. & Ry. 299; 2 Mag. Cas. 7, S. C;) or to hear an appeal against his account, although not previously allowed at a special sessions; (*Rex v. Colchester*, 5 Bar. & Ald. 535; 1 Dowl. & R. 146, S. C.; and see *Rex v. Gloucestershire*, 1 Bar. & Adolp. 1;) or a complaint against him for not paying over the balance. (*Rex v. Pascoe*, 2 Maule & S. 343; *Rex*

* It is also stated in this case that he might have a remedy in equity against the corporators as partners, if unlawfully suspended, but as we have before seen, supra, § 13, a remedy in equity will not prevent the granting of a writ of mandamus, though it will influence the court if the exercise of the discretion which they possess. The case in question might, perhaps, be sustained upon this ground, if it were regarded as simply declaratory of the general principle that the court will not grant the writ, where the remedy in equity is in their judgment plain, simple and expeditious; but if it be regarded as affirming that a remedy in equity is an answer to an application for the writ, it is too broad and inconsistent with later decisions.

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v. *Manchester*, 1 Dowl. & Ry. 454; *Rex v. Worcestershire*, 3 Dowl. & Ry. 299; 2 Cas. Mag. 7, S. C.) But not to justices to commit an overseer for not accounting. their authority, in that respect, being discretionary.

Poor.—See Commissioners.

Postmaster General.—Mandamus lies to the postmaster general, requiring him to give a credit on his books to certain contractors; which credit had been certified by the solicitor of the treasury to be due to the contractors pursuant to an act of congress; and the postmaster general had been ordered by the same act to give the credit, but refused compliance. (*Kendall v. U. States*, 12 Peters, 524.)

Railway Companies.—See Corporations.

Rate.—See Overseers.

Records.—See Clerk, Register of Deeds.

Religious Society.—See Corporations, *infra*, § 38, *et seq.*, Trustees.

Register of Deeds.—In Connecticut, a mandamus was ordered to issue against a register of deeds, to require him to record a deed of bargain and sale given by a collector to the purchaser of lands sold for taxes. (*Strong's case*, Kirby, 345.) See Clerk, Inferior Court, Mayor.

Schoolmaster.—A mandamus lies to restore a party to the office of a master of a free school. (*Anon. Lofft*, 146.) See Warden.

Secretary.—A mandamus is the proper remedy to compel a secretary of state to deliver a commission to which a party is entitled. (*Marbury v. Madison*, 1 Cranch, 137.) So it lies to the secretary of the land-office, of Pennsylvania, to compel him to issue patents to warrantors, under the act of 8th March, 1815. (*Commonwealth v. Cochran*, 1 S. & R. 473.) And it lies also to the secretary of the land-office, to compel him to make the calculations of interest and purchase money on the lands sold, but not to make them in a certain manner, nor in a proper manner. (*Griffith v. Cochran*, 5 Binn. 87.)

Selectmen.—In Connecticut, a mandamus will lie to compel selectmen of a town to pay the damages assessed on a highway laid out by them, and to open such highway. (*Treat v. Middletown*, 8 Conn. 243.)

Sewers.—See Commissioners.

Sheriffs.—Mandamus lies to a sheriff to compel him to execute a deed to a redeeming creditor, but without prejudice to the rights of the parties in a future litigation in equity. (*Van Rensselaer v. Sheriff of Albany*, 1 Cowen, 501.) See *Ex Parte Wilson*, (7 Hill, 150,) where this writ was denied to compel a sheriff to give a deed to a creditor seeking to redeem, whose judgment was not a lien within the redemption law or the act of 1837. (See also *The People v. Perrin*, 1 Howard Sp. T. Rep. 75. *Lester v. Gates*; *Thompson v. Gates*, *id.* 77.) Whether a mandamus is the appropriate remedy to compel a sheriff to make a deed to property which he has sold? (*Davis v. Pryor*, 6 S. & M. 114.)

Speakers.—In Ohio should the speakers of the two houses in the general assembly refuse to sign a certificate of an election, it seems that the supreme court can compel them to do it by mandamus. (*The State of Ohi v. Maf-fit*, 5 Ohio, 358.)

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Steward.—See 1 Chit. Gen. Prac. 792, 793, 810, 811, *supra*, Books and Documents.

Supervisors.—Where under the loan act of New York of 1786, (which authorized the emission of bills of credit to the amount of £200,000, and loaning the same upon mortgage on real estate, and provided that if any deficiency should accrue upon foreclosure, the same should be assessed and levied as other county charges, in the county where the lands were situate,) a loan was made, and upon the foreclosure in 1792. there was a deficiency: it was held, on a motion for mandamus in 1833, that the writ would lie to the supervisors, to compel them to raise the deficiency as the ordinary county charges were levied and collected. (*The People v. The Supervisors of Columbia*, 10 Wend. 363.*) So where under the act of June 19th, 1812, by which the towns of Greenbush and Berlin, in Rensselaer, were divided into three towns, the overseers of the poor and the supervisors of said towns were required to meet and apportion the money and poor belonging to the said two towns amongst the three. It was held, that if the duty was neglected, either entirely or partially, by omitting to pass upon a particular pauper, that a mandamus would lie to compel them to correct the apportionment. (*In re The Supervisors, &c. of the Town of Sandlake v. The Supervisors, &c. of Berlin*, 2 Cowen, 485.) So a mandamus lies to the supervisors of a county, to compel them to allow the account of the clerk of the county, for advances, made by him in purchasing books for recording deeds and mortgages, &c. and for sending notices to judges and justices of the peace of the pedlars who are licensed, with interest on such advances. Such services being required by law of the clerks, and no specific compensation provided for them, they are properly chargeable to the county, and ought, therefore, to be allowed by the supervisors and paid according to the act, (sess. 36, ch. 49, s. 1. 2 N. R. L. 137. 1 Rev. Statutes, 386,) for defraying the public and necessary charges in the respective counties, &c. (*Bright v. The Supervisors of Chenango*, 18 Johns. R. 242.) So where a judge of the county courts attended at the clerk's office, on notice from the clerk, to witness the drawing of juries, it was held, that a mandamus would lie to the supervisors of the county to compel them to fix his compensation. (*The People v. The Supervisors of Albany*, 12 Wend. 257.) So a mandamus will lie to compel the supervisors to audit the account of the clerk

* The alternative mandamus in this case was taken in July, 1832, by the attorney general. The point was raised, and the court decided that the presumption of payment in analogy to the statute of limitations, was not applicable to demands due to the government previous to the revised statutes, which extended that statute to actions in the name of the people. (See Stat. 9 Geo. III. c. 16. 32 Geo. III. ch. 58.) Thus affirming the common law principle, *nullum tempus occurrit regi*, (2 Inst. 273; Bro. Max. 27,) and applying it to the government of the state. But if the case were again to arise, it might be successfully urged, in view of the statute, that the people had slept upon their rights, (see § 16, *supra*, p. 217-14,) and that another maxim of the common law should intervene—*vigilantibus, non dormientibus jura subveniunt*. (2 Inst. 690. Bro. Max. 391. Wing. Max. 672.) The New York statute is broad enough to support this view. (See 2 R. S. of N. Y. 2d ed. 225, § 28.)

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of the oyer and terminer and general sessions, for engrossing and entering the minutes of these courts. (*Doubleday v. The Supervisors of Broome*, 2 Cowen, 533. See *Mallory v. The Supervisors of Cortlandt*, id. 531.) The principle of *Bright v. The Supervisors of Chenango*, is, that a public officer who is required to perform a certain service, where no compensation is provided for such service, is entitled to receive a reasonable allowance therefor, to be audited by the board of supervisors. The same principle is recognized in *Mallory v. The Supervisors of Cortlandt* and *Doubleday v. The Supervisors of Broome*, though in the first of these cases the right to compensation was denied, on the ground of a direct expression of the legislature that no compensation should be given. (Per Savage, Ch. J., 12 Wend. 257, in *The People v. The Supervisors of Albany*.) So, in Pennsylvania, a mandamus lies to the supervisors of roads, to compel them to pay an order drawn on them by justices of the peace, in conformity with the act of 17th April, 1795. (*Commonwealth v. Johnson*, 2 Binney, 275.)

Surrogate.—See Ecclesiastical Courts, &c.

Taxes.—See Commissioners. Supervisors.

Tax Collector.—Upon the principle that an application for a writ of mandamus, is addressed to the sound legal discretion of the court, and will not be awarded to enforce the performance of an act which is contrary to law, where, by law, the tax collector was required to pay all moneys by him collected into the state and county treasuries; an order of the board of police to a tax collector to pay the taxes collected to a particular person, not the county treasurer, is without authority of law, and a mandamus should not be issued to compel the tax collector to obey it. (*Ross v. Lane*, 3 S. & M. 695.) Where a mandamus was issued by the circuit court to a tax collector, to collect a certain tax, and he appealed, and pending the appeal, his term of office expired; held, that the high court would not grant a mandamus against his successor. (*Ibid.*)

Treasurer.—A writ of mandamus lies to compel a town treasurer to issue his warrant of distress against a collector of taxes neglecting to collect and pay over the same, according to the assessor's warrant. (*Waldron v. Lee*, 5 Pick. 323.) Mandamus to the treasurer and directors of the St. Katherine's Dock Company, under the stat. 6 Geo. IV. ch. 5. (*Corpe v. Glyn*, 3 Barn. & Adolph. 801.)

Trustees.—A mandamus lies to compel trustees of a county in Ohio to distribute moneys to religious societies. But it is a good return, that the moneys had been all distributed by a former board of trustees. (*State v. Warren County*, 2 Ham. 10. See also, upon this subject, *The People ex rel. Dikeman et al. v. The President and Trustees of Brooklyn*, 1 Wend. 318. See *Mandamus to Corporations, infra.*)

Visitor.—Mandamus lies to a visitor to compel him to receive and hear an appeal, and give some judgment. (*Rex v. Ely*, 5 T. R. 475. *Rex v. Lincoln*, 2 id. 338. *Rex v. Bury*, id. 346. *Rex v. Worcester*, 4 Maule & S. 415.) When not. (*Rex v. Conynham*, 5 B. & Ald. 885. 1 Dowl. & R. 529.)

Warden.—This writ also lies to a warden of a college to compel him to affix the corporate seal to an answer in chancery. (*Rex v. Windham, Cowp.*)

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377. *Rex v. Cambridge*, 3 Burr. 1647;) to admit a chaplain, especially if there be no other visitatorial power, (*Rex v. Warwickshire*, 2 Dowl. & Ry. 299,) to restore a master of a college, (*Patrick's case*, T. Raym. 111,) or a schoolmaster of a grammar school by the crown, (*Rex v. Morpette*, 1 Str. 58,) or an usher of such a school. (*Craford's case*, Sty. 457; *Stamp's case*, T. Raym. 12.)

*Mandamus to Corporations.**

§ 33. We have before seen, that one of the modes in which the courts exercise common law jurisdiction over civil corporations, for the purpose of compelling them to observe the ordinances of their constitution, and to respect the rights of those entitled to participate in their privileges, is by the writ of mandamus. (See Angell and Ames on Private Corporations, ed. 1846, p. 610.) Let us now consider, more in detail, the general principles which govern this writ in its application to corporations. And

I. This writ will not lie to control the discretion of a corporate body or officer, though it may be had to compel such discretion to be exercised.

Therefore, a mandamus will lie to compel a visitor to receive and hear an appeal; (*Usher's case*, 5 Mod. 452, no decision; *Dr. Walker's case*, B. R. H. 212; and 2 Kyd on Corp. 279; *Rex v. Bishop of Ely*, 1 Wils. 266; 1 Black. R. 52, where it is considered doubtful; *The King v. Bishop of Lincoln*, 2 T. R. 338, n. a.; *The King v. The Bishop of Ely*, 2 T. R. 338; *The King v. The Bishop of Ely*, 5 T. R. 477; *The King v. The Bishop of Worcester et al.* 4 M. & S. 415; Angell and Ames on Priv. Corps. ed. 1846, p. 623, § 5;) and to form some judgment, though they will not compel him to go into the merits. (*The King v. The Bishop of Lincoln*, 2 T. R. 338, n. In this case it is said that it is sufficient, if he decides that the appeal comes too late.) And such judgment, when rendered, is final and conclusive, nor can it be reviewed in any form of proceeding, either directly or collaterally. (*Daniel Appleford's case*, 1 Mod. 82. Carth. 92, 93, cites 1 Mod. 82. 1 Lev. 23, 63. 2 Liv. 14. Raym. 56, 94, 100. Sid. 94, 152. 346. *Phillips v. Bury*, 2 T. R. 346. S. C. Skin. 447. S. C. 1 Ld. Raym. 5. Ca. Parl. 45. *Rex v. Bishop of Ely*, 2 T. R. 290. 1 Black. R. 85.) Nor need the cause of a sentence of deprivation be disclosed in pleading. (*Phillips v. Bury*, 2 T. R. 353, 354. *Kean's case*, 7 Co. 42. Rastal's Ent. fol. 1. Allen, Nash Jo. 393. *Murdock's Appeal*, 7 Pick. (Mass.) R. 322, per Parker, C. J.) The reason of this is, that the visitor's proceeding is *in rem*, he pronounces operatively upon the *status* of the party deprived, (2 Smith's Leading Cases, 447, notes to *Doe v. Oliver and Dutches of Kingston's case*,) and an estoppel quasi of record arises. And it has been held, that though a visitor has exceeded his jurisdiction, this writ will not lie to restore the party expelled, for that would be to command a visi-

* The editor cannot too fully express his obligations to Messrs. Angell and Ames, for their kind permission to make the very free use he has done of their valuable treatise on the Law of Private Corporations, a work so complete and exhaustive as to render unnecessary any further examination of this branch of the subject.

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tor to reverse his own sentence. (*Brideoak's case*, H. 12 Anne, and cited in *Rex v. The Bishop of Chester*, 1 Wils. 209. S. C. 1 Black. R. 25, and in *Rex v. The Bishop of Ely*, 1 Black. R. 58. 2 Kyd on Corp. 281.) In such a case, however, an action for damages would probably lie. (*Greene v. Rutherford*, 1 Ves. 470. See *Rex v. Bishop of Chester*, 1 Wils. 209. See note (b) to *Case v. Shepherd*, *supra*, page 28. But see, per Cowen, J. in *The People v. Collins*, 19 Wend. 56.) So also it has been held, that mandamus will not lie to compel the benchers to admit a member, or to call one qualified to the bar, upon the ground that the judges of England enjoy a species of visitatorial power over the ius of court. (Angell and Ames on Priv. Corps. ed. 1846, p. 652, 637. *The King v. Gray's Inn*, 1 Doug. 353. *The King v. The Benchers of Lincoln's Inn*, 4 B. & C. 855. See also *Rex v. Barnard's Inn*, 5 Adolph. & Ellis, 17.) And this principle is further illustrated in a number of cases. Thus "where all the powers of a religious corporation were vested in certain trustees, and a mode was prescribed by statute, in which any corporations desirous of altering or amending their charters might proceed, a mandamus, on the motion of several of the members of the corporation, to compel the trustees to take the necessary steps to alter the charter, was refused on the ground that this was left to them as a matter of discretion. (*Case of St. Mary's Church*, (6 Serg. & Rawle, (Penn.) R. 498.) In the case of *The King v. The Bristol Dock Company*, (6 B. & C. 181,) too, where it appeared that the directors of the company were authorized and required "to make such alterations and amendments in the sewers, as were necessary in consequence of the floating of the harbor," it was held, that a mandamus in the terms of the act was in the proper form; and that it was neither requisite nor proper to call upon the company to make any specific alteration, the mode of remedying the evil being left at their discretion by the act of parliament. (And see *Reg. v. Eastern Counties Railway Company*, 2 Adolph. & Ellis, 569. S. C. 42 Eng. C. L. R. 812." Angell and Ames on Priv. Corps. ed. 1846, p. 656, 657.) And where, by charter, a borough was constituted a body corporate to have perpetual succession, by the name of the mayor and free burgesses of the borough of Fowey. Nine of the free burgesses were to be chosen aldermen. One of the aldermen was to be called mayor. The mayor and aldermen were to form the common council; a person learned in the laws of England was to be the recorder. The charter then authorized the mayor and recorder, or their respective deputies, and the rest of the aldermen of the borough for the time being, or the greater part of them, (of whom the mayor and recorder, or their respective deputies, were to be two,) from time to time, and at all times thereafter, as often, and when to them should seem fit and necessary, to nominate, choose, and prefer so many, and such persons to be free burgesses of the borough, as they pleased, and to those free burgesses so to be chosen, to administer an oath for their fidelity to the borough. And in case any one or more of the aldermen should die, or be removed from his office, the mayor, recorder, justices of the peace, and the rest of the aldermen, or the greater part of them, to elect one other of the free burgesses, inhabitants of the borough, for an alderman, to supply the number of nine. The aldermen so chosen taking the oaths before the mayor, recorder, or one

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of the justices of the peace of the borough for the time being, or before three or more free burgesses, inhabitants of the borough, to execute the office, and the mayor, the ex-mayor, the recorder, and their deputies, and the senior alderman and the senior free burgesses were to be justices of the peace. Nine persons were nominated as the first aldermen, one person as recorder and five persons the first free burgesses. It appeared by affidavits that the body corporate had for three years been reduced to the number of six aldermen and four free burgesses, and that one of the aldermen was in a dangerous state of health, and was upwards of seventy years of age, and incapable of performing the duties of alderman and justice of the peace; that of the four burgesses, two were upwards of seventy years of age, and that another was not an inhabitant of the borough. The court refused to grant a mandamus to compel the mayor and aldermen to proceed to the election of free burgesses, or to hold a meeting for the purpose of considering the propriety of proceeding to such an election. (*The King v. The Mayor, &c. of Fowey*, 2 Barn. & Cresw. 584. S. C. 4 D. & R. 39.) Holroyd, J. observes in this case, "By the charter, the mayor and aldermen are to elect such and so many free burgesses as they shall think fit. It is not competent therefore to the court to grant a mandamus directing them to elect any." It is proper, however, to be observed, that the decision in this case may be rested upon another principle, namely, that this writ will not be granted to compel a corporation to supply vacancies in an indefinite class, if sufficient remain out of whom to elect members for the definite class; since this would be lessening their chance of being elected into the definite class. In such case, the application ought first to be, to compel the corporation to fill up the vacancies in the definite body; and afterwards, to prevent a dissolution of the corporation, the court would perhaps grant a mandamus to elect a sufficient number into the indefinite class, although it may be very difficult to point out how many are to be elected, which is a strong argument against granting the writ. (Angell and Ames on Private Corporations, ed. 1846, p. 634, 635, citing *Rex v. Fowey*, *ut supra*.)

§ 39. Let us now consider some of the cases in which the writ under consideration has been adjudged to lie to corporations. And in the course of this inquiry, let us examine a number of cases which naturally arise where the application for this writ was denied, upon the ground that the merits did not call for the interposition of the court, independently of the general rules we have before considered.

I. The writ of mandamus will lie to corporations as to inferior tribunals and officers, to compel them to exercise their discretion, though not to direct the manner of its exercise.

Thus where by act of parliament empowering certain persons to make a floating harbor at Bristol, it was enacted, "that it should and might be lawful for the directors of the British Dock Company, and they were thereby authorized and required to make a common sewer in a certain direction therein specified, and also, to alter and reconstruct all or any of the sewers of the said city at the mouths thereof, so and in such manner that the sewers might be

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discharged considerably under the surface of the water in the floating harbor, and also to make such other alterations and amendments in the sewers of the said city as might or should be necessary in consequence of the floating of the said harbor." It was held, that a mandamus to the directors "to make *such alterations and amendments in the sewers as were necessary* in consequence of the floating of the harbor," was in the proper form, and that it was neither requisite nor proper to call upon the company to make any specific alteration, the mode of remedying the evil being left to their discretion by the act of parliament. (*The King v. The British Dock Company*, 2 Barn. & Cresw, 181. See also the authorities cited in §§ 37, 23, 34.)

§ 40. II. A mandamus will lie to compel a corporation to elect officers. "Accordingly in case of public corporations, it has been decided that a mandamus lies to compel them to proceed to the election of a new mayor, at any time after the charter day has passed without such election, where the former mayor, having power to do so, holds over, and refuses to convoke an assembly for that purpose; unless indeed the charter restrain the right of electing to a particular time; (*Rex v. Cambridge*, 4 Burr. 2011; *Rex v. Gregory*, 8 Mod. 113, 127;) to compel a new election of a mayor, where the re-election of the former mayor was void; (*Rex v. Pembroke Corp.* 8 Dowl. P. C. 302;) to compel the corporation to proceed to an election of members to supply vacancies in a definite integral class, after a reasonable time has expired from the period of their occurrence, during which they have neglected to fill them up; nor is it an objection to the granting of the writ, that at the time of application for it, an information in the nature of a quo warranto is pending against the mayor and corporators, to whom it is directed. (*Anon.* 2 Barnard, 236. *Rex v. Grampound*, 6 T. R. 302. *Rex v. Fowey*, 2 Barn. & Cresw. 596. S. C. 4 D. & R. 139.) It will also be granted to compel the corporation to proceed to the election of one out of two persons put in nomination for an office, when the course of proceeding is for one class of the corporation to nominate two persons, of whom another class is to elect one into office. (*Rex v. Abingdon*, 1 Lord Raymd. 561. *Rex v. Ely*, 2 T. R. 334.) And though the officers be annual ministerial officers as mace bearers, yet if public ministers, and necessary in the execution of the judicial functions of the corporation, and not mere servants, a mandamus lies to the corporation to compel it to elect them." (*Rex v. St. Martin*, 1 T. R. 149. *Rex v. Liverpool*, 1 Barnard, 83. Angell and Ames on Priv. Corps. ed. 1846, p. 634.) Messrs. Angell and Ames, in their treatise on the Law of Private Corporations, (p. 635,) observe—"We see no reason why the same remedy should not lie against a private corporation aggregate, to enforce an obedience on the part of the members to the charter, or act of incorporation under which they act, if they neglect or refuse to elect their proper officers. In the case of *Rex v. The Bishop of Ely*, (2 T. R. 290,) the court of king's bench awarded a mandamus against the bishop, commanding him to appoint as master one of two fellows presented to him by the fellows of a college; holding that he enjoyed his power of appointment not in virtue of his visitatorial capacity, but by the special appointment of the founder. And in *The King v. The Master and Fellows of St. Catharine's Hall*,

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(4 T. R. 233, 243, 244, 245,) which was an application for a mandamus to a college, commanding them to declare a fellowship vacant, and to proceed to the election of another fellow, though the court of king's bench disclaimed jurisdiction over the particular case, as being in the king in chancery, yet no objection was taken that mandamus could not lie, to compel an election in case of a private corporation."

§ 41. III. A mandamus will lie to compel a corporator of a public corporation, duly elected, to take upon himself the execution of his office, though the defendant may plead any sufficient excuse for not accepting the same. (*Rex v. Merchant Tailors*, 2 Lev. 200. *Rex v. Brown* and *Rex v. Leyland*, 3 M. & S. 186, 188.) Therefore, in *The King v. The Corporation of Bedford*, (1 East, 79,) a rule was granted to one who had been elected mayor of a borough, and to the late mayor, commanding them to show cause why a writ of mandamus should not issue to them, requiring the late mayor to swear the one who had been elected into office, and the latter to appear before the said late mayor and take the oaths, &c., and thereupon to take upon himself the office of mayor. The rule was answered by showing for cause, that the person elected was equally disqualified to serve, and thereupon the court granted a mandamus to elect another mayor.

§ 42. IV. So this writ will lie to compel a corporation to admit one elected to an office in a corporation to the legal possession of his right. (Angell and Ames on Private Corps. ed. 1846, p. 636.) The writ, however, "confers no title upon the person admitted, its sole operation being to put him in a situation to enforce his former title, if sufficient in law. For the sake of preserving peace in corporations, it will not be granted, unless the applicant show a *prima facie* title. Thus, it lies to compel the proper officers to admit to the possession of his office or place one elected to be mayor, bailiff, or other officer, an alderman, jurat, capital, or other burgess; one of the approved-men, or one of the eight-men, if the affidavits show that approved-men, or eight-men, are a class of corporate officers; a high steward, a common-councilman, recorder, a town clerk, a steward of a court leet, an attorney of the court of a liberty; a livery man of a company, being a member of a municipal corporation; a sword bearer, if an officer of justice; a serjeant, a constable, a bailiff, though a ministerial officer, or even a common freeman. (Rol. Abr. Rest, p. 4, 8, 7. *Steven's case*, T. Ray. 431. *Shuttleworth v. Lincoln*, 2 Bulst. 122. *Rex v. Canterbury*, 1 Lev. 119. *Taylor's case*, Poph. 133. *Braithwaite's case*, Vent. 19. *Anon.* 1 Lev. 148. *Rex v. Wilton*, 5 Mod. 257. *Clerk's case*, Cro. Jac. 506. *Parker's case*, 1 Vent 331. *Rex v. Tidderley*, Sid. 14. *Guilford's case*, T. Ray. 152. *Roe's case*, Comb. 145. *London v. Estwick*, Sty. 32. *Bret's case*, Comb. 214. *Rex v. Wells*, 4 Burr. 1999. *Anon. Dyer*, 332, b. n.; *Taverner's case*, T. Ray. 446. *Middleton's case*, 1 Sid. 169. *Milward v. Thatcher*, 2 T. R. 87. *Stamp's case*, T. Ray. 12. *Baxter's case*, Sty. 355. *Audley v. Joyce*, Poph. 176. S. C. Noy, 78. *Dighton*, 1 Vent. 78, 82. *Rex v. Campion*, 1 Sid. 14. *Baxter's case*, Sty. 457. *Hurst's case*, 1 Lev. 75. S. C. 1 Sid. 94, 152. *Anon.* and *Rex v. Westminster*, Comb. 244.

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Rol. Abr. 456.) It will lie also to compel the proper officers to admit to the freedom of a corporation any of that class of persons, who are possessed of an incorporate right according to the regulations of the constitution, such as apprentices who have served their time; and to take all such steps as may be necessary, preparatory to their admission. (*Townsend's case*, T. Ray. 69. 8. C. 1 Lev. 91. S. C. 1 Sid. 107. *Green v. Durham*, 1 Burr. 131. *Olithero case*, Comb. 239. *Rex v. Ludlam*, 8 Mod. 270. *Wannel v. London*, 1 Stra. 675. *Rex v. Harrison*, 3 Burr. 1328. S. C. W. Black. 3712.) The writ has also been granted to compel an insurance company to swear in a director, the company having been created by charter from the crown; (*Anon.* 1 Stra. 696;) to restore directors of a banking corporation, who were refused the exercise of their rights as directors by a majority of the board, (*Prieur & Labutst v. President, &c. Com. Bank*, 7 Louisiana R. 509,) or a member of a navigation company who was disfranchised without notice or opportunity of defence; (*Delacy v. Neuse River Nav. Co.* 1 Hawk. (N. C.) R. 274;) to compel the trustees of a meeting house to admit a dissenting minister who was duly elected, (*Rex v. Barker et al.* 3 Burr. 1265,) and trading companies to admit as members those entitled to become such. (*De Costa and the Russia Company*, 2 Stra. 783. *Rex v. March*, 2 Burr. 999. Id. p. 637. See also id. 638, 639. *Supra*, § 35.)

§ 43. V. We have already mentioned, (§ 35,) that a mandamus will be granted to restore wherever it would be granted to admit a member or officer of a corporation.

"A mandamus has been granted to restore a clerk to a butcher's company, (*White's case*, 2 Ld. Raym. 1004,) a clerk to a company of masons, a treasurer to the governors of the new water works, (*Rex v. Governors of Water Works*, 1 Lev. 123; S. C. 2 Sid. 112; *Middleton's case*, 1 Sid. 169,) a clerk or surveyor of the city works, (*Rex v. Mayor, &c. of London*, 2 T. R. 182, n.) a town clerk, a common clerk of a vill, a parish clerk, a sexton, and a scavenger. (1 Vent. 143, 153. *Rex v. Slatford*, Comb. 419. Sty. 458. *Rex v. Guardianos de Thame in Com. Oxon.* 1 Stra. 115. *Rex v. Barker and another*, 3 Burr. 1267, per Lord Mansfield. 2 Kyd on Corp. 320.) In England, it has been decided, that it lies to restore the schoolmaster of a grammar school founded by the crown, (*Rex v. Ballivos de Morpeth*, 1 Stra. 58,) or the minister of an endowed dissenting meeting house; (*Rex v. Barker and another*, 3 Burr. 1265; S. C. 1 Black. R. 300, 352; *Rex v. Joatham*, 3 T. R. 575;) and in our own country, to restore a trustee of a private academic corporation, though no emoluments were attached to his office. (*Fuller v. Plainfield Academic School*, 6 Conn. R. 533.) Here, too, the remedy has been applied to restore a member and trustee of a religious incorporation, (*Green v. The African Methodist Episcopal Society*, 1 Serg. & Rawle, (Penn.) R. 254,) and in several cases, to restore the members of private corporations for charitable purposes, (*Commonwealth v. St. Patrick Benevolent Society*, 2 Binn. (Penn.) R. 448; *Commonwealth v. The Philanthropic Society*, 5 Binn. (Penn.) R. 486; *Commonwealth v. The Pennsylvania Beneficial Institution*, 2 S. & R. (Penn.) R. 141,) illegally expelled. If, however, the charter of a society provides for

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an offence, directs the mode of proceeding, and authorizes the society on conviction of a member to expel him, their judgment of expulsion, if the proceedings are not irregular, is conclusive and cannot be inquired into collaterally, by mandamus, action, or any other mode. (*Commonwealth v. The Pike Beneficial Society*, 8 Serg. & Watts (Penn.) R. 247.)

"A suspension from office warrants the granting of this writ, as well as a removal; for a suspension is a temporary amotion, and otherwise, it is said, under pretence of repeated suspensions, an officer might be entirely excluded from the advantage of his situation. (*Rex v. Guilford*, 1 Lev. 162. S. C. T. Ray. 152. *Rex v. London*, 2 T. R. 182. *Rex v. Whitstable*, 7 East, 355, and n. Willcock on Mun. Corp. 379.) And the writ has been granted to restore a member of an university, who has been improperly suspended of his degrees. (*Rex v. University of Cambridge*, T. 19, G. 3. *Dr. Ewin's case*, 2 Sel. N. P. (Wheat's ed.) 824.) As in case of admission, so it will be granted to restore a deputy on the application of his principal, though not on the application of the deputy himself. (*Rex v. President des Marches*, 1 Lev. 306.) The modern decisions upon this subject seem indeed to be made in the spirit of Lord Mansfield's rule, that wherever there is a right and no other specific remedy, this will not be refused. Where it appears from the showing of an officer, that he has been justly though irregularly removed, (*Rex v. Axbridge*, Cowp. 523; *Rex v. Bristol, Mayor*, 1 D. & R. 389; S. C. 5 B. & A. 731; *Rex v. Bank of England*, 2 B. & A. 620,) or in case of a financial officer for life, or *quamdiu bene se gesserit*, who is suspended until he has submitted his accounts to the proper officer, and paid over the balance due, that he has refused to do so, and been guilty of contumacy and improper conduct towards those whose officer he is, a mandamus to restore, it has been decided, will not be granted. (*Rex v. London*, 2 T. R. 182.) Neither will the writ be granted to restore one who has been ousted in *quo warranto*, or who has resigned his office; since judgment in *quo warranto* is conclusive against the defendant, whether on the writ or on the information; and after a resignation has been accepted, the corporator cannot resume his office. (*Rex v. Tidderley*, 1 Sid. 14. *Rex v. Campion*, id.) And where A. was removed, and B. elected in his place, afterwards A. restored by mandamus, and subsequently his office became vacant; upon the application of B. for a mandamus without a new election, the writ was refused; for A. was a legal officer at the time of B.'s election, so that B. never acquired any title to the office. (*Shuttleworth v. Lincoln*, 2 Bulstr. 122.) It is, however, no objection to the granting of a mandamus to restore, that another has been elected to the office, since the amotion of the applicant. In such case, the court will grant leave to file an information in the nature of a *quo warranto* against the person so elected, at the same time that they award the mandamus. (*Rex v. Bedford Level*, 6 East, 360. *Shuttleworth v. Lincoln*, 2 Bulstr. 122.) A party, whose right to an office has been established by verdict, cannot have a peremptory mandamus to restore him, until he has signed a judgment in the action. (*Neale v. Bowles*, 1 Har. & Woll. 370." Angell and Ames on Priv. Corpora. ed. 1846, p. 642, 643, 644, 645. See also *Howard v. Gage*, 6 Mass. R. 462.)

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§ 44. VI. A mandamus lies in certain cases to compel the amotion of officers.

As where corporate officers are required by statute to take a particular oath, under penalty of being displaced, this writ may be directed to an eleemosynary corporation, commanding it to remove certain persons from their offices for non-compliance with the statute. (*Rex v. St. John's College*, Skin. 549. 3 Salk. 230. See also Angell and Ames on Private Corporations, ed. 1846, p. 640.) In this case, says Mr. Kyd, a *quo warranto* would not have lain, because the college was an eleemosynary foundation; but it would lie in case of corporation officers who should neglect, &c., and therefore mandamus would not be the proper remedy. (2 Kyd on Corpns. 337, n. (a.) Angell and Ames, *ut supra*.)

§ 45. VII. And this writ lies in a multitude of other instances to compel corporations and their officers to do many other acts which they are bound to do, either by virtue of their official station, or by the general law of the land. (See Angell and Ames on Priv. Corpns. ed. 1846, p. 646.)

Thus the writ of mandamus lies to the "warden of a college, commanding him to affix the corporation seal to an answer of the fellows to a bill in chancery, though he disapprove of the answer, and it is contrary to his own separate answer put in; (*Rex v. Windham*, Cowp. 377;) to the keepers of the common seal of an university, commanding them to put it to the instrument of appointment of their high steward, pursuant to a grace passed in the senate; (*Rex v. Vice-Chancellor, &c. of Cambridge*, 3 Burr. 1648;) to a master of an hospital possessed of the advowson of a living, to compel him to put the corporate seal to a presentation where the nomination has been made by a majority of the body of the master and brethren, the right to nominate being in such body; (*Rex v. Kendall*, 1 Adol. & Ellis, (N. S.) 366; S. C. 41 Eng. C. L. R. 581;) and to the mayor of a city corporation, to compel him to put the corporate seal to the certificate of an officer's election, where, by the constitution of the corporation, the mayor is bound to certify the election to the king for his approbation. (*Rex v. York*, 4 T. R. 699, 700; and see *Strong, Petitioner*, &c. 20 Pick. (Mass.) R. 484; where a mandamus was held to lie to a board of examiners, to compel them to give a certificate of his election to a county commissioner, though another person, upon a new election ordered, was elected in his place, whom he might be obliged to remove by *quo warranto*.) In *The Commonwealth v. The Trustees of St. Mary's Church*, (6 Serg. & Rawle, (Penn.) 508,) which was an application for a mandamus to compel the trustees of a religious corporation to affix the common seal to certain alterations and amendments of the charter, no objection was taken by the court to the form of remedy; though, for substantial reasons of another kind, the application was rejected. And where the regulations of a corporation rendered it necessary for the acquisition of the freedom, that the indentures of apprenticeship should be enrolled, a mandamus was granted to compel the proper officers to enroll them; the applicant showing in his affidavits the necessity of the enrollment, and that application had been made in vain to the officer to perform his duty. (*Rex v. Coopers of Newcastle*, 7 T. R. 545.) So

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a corporator may have a mandamus to compel the custos of corporate documents to allow him an inspection, and copies of them, at proper times and upon proper occasions; he showing clearly a right on his part to such inspection and copies, and refusal on the part of the custos to allow it. (*Rex v. Newcastle*, 2 Str. 1223. *Rex v. Shelley*, 3 T. R. 142. *Rex v. Babb*, 3 T. R. 580, 581. *Rex v. Lucas*, 10 East, 235. *Edwards v. Vesey*, C. T. II. 128. *Rex v. Tower*, 4 M. & S. 162. *Rogers v. Jones*, 5 D. & R. 484. *Rex v. Trivannion*, 2 Chit. R. 306, n. *Rex v. Chester*, 1 Chit. R. 476, 477. n. 479. When the corporator's application to inspect is founded on his general right, he has a mandamus; but when on a suit pending, he has a rule. *Ibid.* and see *Southampton v. Greaves*, 8 T. R. 592. *Bateman v. Phillips*, 4 Taunt. 162. Willcock on Mun. Corp. 349.) A director of a bank may also have the writ directed to the cashier who refuses, under a resolution of the board of directors to that effect, to permit him to see the discount book; and in such case, the writ may also be well directed to the directors themselves. (*People v. Throop*, 12 Wend. 183.) In such cases, however, there must be a distinct refusal on the part of those having the control of the books to permit the corporator or director to inspect them, he, it seems, stating the purpose for which he demanded the inspection at the time of demand. (*Rex v. Wilts. & Berks. Canal Navigation*, 3 Adolp. & Ellis, 477. *Rex v. Trustees of North Leach and Whitney Roads*, 5 B. & Adolp. 978.) A mandamus lies also to the late mayor of the city corporation, to deliver the insignia of his office to the new mayor; (*Rex v. Owen*, Comb. 399; *Rex v. Dublin*, 1 Stra. 539; *Rex v. Ipe-wich*, 2 Ld. Ray. 1238; *Crawford v. Powell*, 2 Burr. 1016; *Rex v. Monday*, Cowp. 539;) to a former town clerk; (*Crawford v. Powell*, 2 Burr. 1016; *Commonwealth v. Athearn*, 3 Mass. R. 285;) or a clerk of a company, (*Rex v. Wildman*, 2 Str. 879,) to deliver to his successor the common seal, books, papers, and records of the corporation, which belong to his custody; or to a steward who keeps the public books of a corporation, to compel him to attend with the books at the next corporate assembly. (*Case of the Borough of Calne in Wilts.* 2 Stra. 949.) Indeed, it lies to any person who happens to have the books of a corporation in his possession, and refuses to deliver them up; as to an executor, who refuses to deliver up the books of a borough, until money expended by his testator on account of it should be repaid." (*Rex v. Ingram*, 1 Blacks. R. 50. See Angell and Ames on Priv. Corpora. ed. 1846, p. 646, 647, 648.) So also mandamus lies "to a railway company, bound by act of parliament to set out their deviations, and make their compulsory purchases within stated periods, to do those acts within the times limited, so that they might complete the line of railroad, which having undertaken they were obliged by the act to finish; (*Reg. v. Eastern Counties Railway Co.* 2 Perr. & Dav. 648; and see *Reg. v. Birmingham Railway Co.* 2 Adolph. & Ellis, (N. S.) 47; S. C. 42 Eng. C. L. R. 566; *Reg. v. Manchester & Leeds Railway Co.* 3 Adolph. & Ellis, (N. S.) 528; S. C. 43 Eng. C. L. R. 851;) and to a dock company commanding them to repair the bank of a new channel by them cut which was broken down to the obstruction of navigation. (*Reg. v. Bristol Dock Company*, 2 Adolph. & Ellis, (N. S.) 64; S. C. 42 Eng. C. L. R. 574.) It lies to compel a mayor to perform any part of his duty, as presiding

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officer, after he has been guilty of a default in the performance of it. (*Rex v. Everett*, C. T. H. 261. *Rex v. Williams*, 2 M. & S. 144.) It has also been granted to compel a canal company to enter upon their books the probate of a will of a deceased shareholder, (*Rex v. Worcester Canal Company*, 1 Man. & Ry. 529,) to register a conveyance, (*Cooper v. Dismal Swamp Co.* 2 Murphy, (N. C.) R. 195,) though not to compel them to enroll a conveyance of lands to them pursuant to the provisions of an act, after the lapse of sixty-five years, without effort during that time to compel them so to do. (*Reg. v. Leeds Canal Co.* 3 Ferr. & Dav. (Q. B.) 174). And where a statute made it the duty of a turnpike corporation to grant a certificate of amounts due by them for repairs, &c., attested in a certain manner, and to transmit a duplicate of the same to the state treasurer, in order that payment might be made by the state, and deducted out of the appropriations made to the corporation; a mandamus was granted to compel them to deliver to the relator, and transmit to the treasurer, such a certificate." (*Commonwealth v. The President, Managers and Company of the Anderson Ferry, Waterford and N. Haven Turnpike Road*, 7 S. & R. (Penn.) R. 6. Angell and Ames on Priv. Corps. ed. 1846, p. 649.) So mandamus lies "where the act incorporating a dock company directed, that all actions against the company, should be brought against the treasurer, or a director for the time being, but that the body, goods, lands, &c. of such treasurer or director should not by reason thereof be made liable, and cross actions between the treasurer, as such, and another were referred to an arbitrator, who awarded against the treasurer, it was held, that mandamus would lie to the treasurer and directors commanding them to pay the sums awarded. (*Rex v. St. Catherine's Dock Co.* 4 B. & Adolph. 360. 1 Nev. & M. 121.) And where a railway company was incorporated by an act, which provided, that the public should have the beneficial enjoyment of the same, it was held, that mandamus would lie, to compel them to lay down, and reinstate the railway; they having torn up the iron tram plates for several hundred yards, in order to prevent the collieries of others from coming in competition with those of several leading members of the company." (*Rex v. The Severn and Wye Railway Company*, 2 B. & A. 646; and see *Whitemareh Township v. The Philadelphia Germantown and Norristown Railroad*, 8 Serg. & Watts, (Penn.) R. 365; where it is held that a mandamus may be applied for in Pennsylvania by the supervisors of a township commanding a railroad company to make a road for public accommodation, required by their charter. Angell and Ames on Priv. Corps. ed. 1846, p. 650.)

Of the proceedings on Mandamus.

§ 46. The mode of proceeding by mandamus was well settled under the common law, and, with the other parts of that venerable institution, has been adopted in nearly all the States of the Union. It has, however, been changed in some respects by legislative enactment in the various states, but, nevertheless, it has been held, that where the occasions upon which it ought to issue are not pointed out by statute, a recurrence to the common law is necessary to learn in what cases the writ is a proper remedy; (*Turner's case*, 5 Ham-

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mond, 542;) and that the proceedings upon mandamus must, (except in the case of an intervening statute,) be according to the practice of that law (*Universal Church v. Trustees*, 6 Hammond, 445.)

§ 47. The application to the court must be founded upon affidavit, stating the right of the party injured, and the denial of justice. (*Rex v. Jotham*, 3 Term R. 575. 1 Gude Crown Pr. 181.) It has been said that it ought to be entitled in the court where the application is made, as "In the king's bench," (id.) but this seems to be unnecessary under the practice in this country. It is, however, fatal if it be entitled in a cause, as for example, "Sup. Court, Andrew Roddy and Wilson Wilkinson vs. Thomas W. Hill," (*The People ex rel. Roddy et al. v. Tioga Common Pleas*, 1 Wend. 291,) because there is no cause pending, and an indictment for perjury in making such an affidavit must fail, as it could not be shown that such a cause existed in the court in which the affidavit was made. (Per Savage, J.) This rule, however, is not to be extended to any entitling that is fairly descriptive of the proceeding, and therefore not within its reason. Hence where an affidavit was entitled, "Sup. Court: In the matter of John La Farge against the Judges of the Court of Common Pleas of Jefferson County," it was held, that it did not fall within the rule, and might be read. (*Ex parte La Farge*, 6 Cowen, 61.) The body of the affidavit should contain a precise statement of all the substantial facts upon which the party relies, in such a form that an indictment for perjury can be founded thereon if it be false. (See *Rex v. Sargent*, 5 Term R. 466, 469.) Upon this principle, the affidavit should show a default, (*Rex v. Borough of St. Ives*, Buller's N. P. tit. Mandamus; 1 Gude Crow. Pr. 181,)—that the applicant has applied to the defendants to do that which he requires the court to command them to perform, and their refusal or neglect. (*Amherst's case*, Sir T. Raym. 214. *Rex v. Bishop of Chester*, 1 Term R. 403. *Rex v. Bishop of Ely*, 2 id. 334. *Rex v. Jotham*, 3 id. 577. 3 Steph. N. P. 231&.) It must also show, that the applicant has complied with all the forms necessary to constitute his right, (id.; Bull. N. P. 201,) and entitle him to the relief he prays. (*Rex v. Bishop of Oxfordshire*, 7 East, 345.) Accordingly, in an affidavit for a mandamus to compel a corporation to pay a poor rate, it must appear that they had no *distrainable* goods. (*Rex v. Margate*, 3 Barn. & Ald. 220. S. C. 2 Chitt. R. 250.) So in an affidavit in support of a motion for this writ to justices to appoint *overseers*, it must be sworn that the district is, or at least that it is reputed to be, a village or parish. (*Rex v. Bedfordshire*, Caldecott, 157. *Anon. Lofft*, 618. *Rex v. Bridgewater*, Cowp. 139. See also *Rex v. Wiltshire*, 1 Wilson, 138.) In an affidavit intended to found a mandamus to compel admission or restoration to an office, the nature of the office, its duties, and other facts necessary to show that it is of a public nature, should be set forth. (1 Chit. Gen. Pr. 808.) And where it is by charter, the substance as applicable should be stated, and an authenticated copy must be produced at the time of making the motion. (Bull. N. P. 200. Selwyn's N. P. Mandamus, 1076.) The election and other circumstances under which the applicant claimed, and still claims to be admitted, must be very distinctly and positively stated, and shown to have been according to the charter or prescrip-

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tion, and this not according to hearsay or mere belief. (Bull. N. P. 200. Selw. N. P. 1077.) So in an affidavit to obtain a rule to show cause why a mandamus should not issue to a court of common pleas to restore an attorney, it should be stated that the court had improperly removed him; (*In the matter of Gephard*, 1 Johns. Cas. 134;) and this should be stated not as a *conclusion* of the deponent, but the *facts* themselves made apparent to the court. (*Rex v. Sargent, ut supra*.) "The affidavit," says Mr. Chitty, (1 Gen. Prac. 808, 809,) "should also anticipate and answer every possible objection or argument in fact which it may be expected will be urged against the claim, *
* * and where any strong evidence is expected, any disputable or material facts should be corroborated by one or more respectable and experienced individuals." But although the affidavits of the applicant may be insufficient in themselves, in consequence of an omission to state a material fact, yet if the defendant by his affidavits supplies the deficiency, the court will grant a mandamus. (*Rex v. Hein*, 3 Term R. 596. 3 Steph. N. P. 2319.)

§ 48. The necessary affidavits having been prepared, the next step is to make an application to the court at the time and in the manner prescribed by its rules. The application is either *ex parte* or upon notice to the defendant. In some cases the latter is required in the first instance, as, for example, in that class which are termed *street cases* in the state of New York. (*Ex parte Albany Water Works Co. v. Albany Mayor's Court*, 12 Wend. 292.) If, however, the application be *ex parte*, the court will not act on it until due notice has been given, for without such notice a mandamus can never be granted. (Angell and Ames on Corpns. 3d ed. p. 658. *Anon.* 2 Halst. 192. *Brosius v. Reuter*, 1 Har. & J. 480.) Again, the application is either that a peremptory mandamus issue at once, or for a rule that the defendant show cause by a certain day therein named, why the particular act sought to be commanded should not be performed, or that a mandamus issue. The former will only be heard upon due notice, accompanied by copies of the papers on which the motion is intended to be founded; the latter will be heard *ex parte*, and granted if the papers present a reasonable case. The application for a rule *nisi* is, however, the usual mode of proceeding. (10 Wend. 30.) Indeed, in Virginia and Ohio, it is said that such a rule must be the first process; (*Turner's case*, 5 Hammond, 42; *Dinwiddie Justices v. Chesterfield Justices*, 5 Call, 556;) and in New York, it has been decided that a peremptory mandamus to a court of common pleas will not be granted in the first instance, but the party must obtain a rule to show cause why it should not issue. (*The People v. Judges of Cayuga*, 2 Johns. Cas. 68. *The People v. Judges of Washington*, 1 Caines' R. 511.) Where a rule *nisi* has been obtained, if no sufficient cause be shown, the defendant will either submit, or a mandamus will issue to exact a return, showing that the required act has been performed, or some adequate excuse for its non-performance. (1 Chit. Gen. Prac. 809. See *Rex v. Jones*, Stra. 704. 3 Steph. N. P. 2319. See *infra*, § 69.)

§ 49. Let us now examine the form of the writ, which, as we have before

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seen, requires a return, or, as it is commonly called, the alternative mandamus. And

I. As to the joinder of persons suing out such writ, it may be generally stated that the same mandamus cannot be made to enforce the separate rights of several individuals; and, therefore, the court will refuse one mandamus to restore a number of persons, the motion of one not being the motion of another, one having, perhaps, been removed for one fault, and one for another, which would make it impracticable for the court to grant a joint restitution to them. (Bac. Abr. Mandamus, B) The case of *The King v. Lord Menta-cute and others*, (1 Wm. Blackstone, 60; S. C. 1 Wils. 283; Bull. N. P. 200;) has been supposed inconsistent with this doctrine, because it was moved for five persons, but the answer made by the counsel who argued in support of the rule seems to be conclusiye, and to take the case out of the principle before stated, namely, that the "grievance in the case was one and the same to all," and in this respect, it is distinguished from the Andover case, (Salk. 433,) in which the general rule was maintained as it has been stated. (See 2 Salk. 436, pl. 19. Comb. 307. 5 Mod. 10. See also 1 Gude Cr. Pr. 189; also id. 204. See, however, as to the joinder of churchwardens, *Regina v. Twitty*, Holt, 424.)

§ 50. II. To whom directed: 1. The writ must be directed to him who by law is obliged to execute it, or to do the thing required. (Bac. Abr. Mandamus, F.) Upon this principle, it has been decided that where the mandamus was directed to the mayor, aldermen and commonalty of Ripon, and they returned that they were incorporated by the name of the mayor, *burgesses* and commonalty of Ripon, the court held the writ bad, because directed to the corporation by a wrong name. (*Rex v. Mayor, &c. of Ripon*, 2 Salk. 443.) And where a mandamus, to admit a person to the office of town clerk, was directed to the mayor and aldermen of Hereford, and in fact the mayor only was to admit, the writ was quashed. (*Rex v. Mayor, &c. of Abingdon*, 2 Salk. 699. *Reg. v. Mayor, &c. of Hereford*, id. 701. *Rex v. Smith*, 2 Maul. & S. 598. Bac. Abr. Mandamus, F.) In New Jersey, it has been decided that one and the same writ of mandamus cannot be directed to the township committees of two several townships, to compel them to proceed to do their duty in a matter of road. (*The State v. Township Committees*, 5 Halst. 292.) A mandamus, however, may be directed to a whole corporation, though part only are to do the act; (1 Roll. R. 409; 1 Ld. Raym. 560; Holt's Rep. 421;) but if it be directed to a part only, it must be directed to that part which is to do the act sought to be commanded. (*Reg. v. Mayor, &c. of Hereford*, *ut sup.* 1 Gude Cr. Pr. 196, 197.) And where the power of motion was in the mayor, aldermen and others of the common council, the mayor and aldermen being part of the common council, and the writ was directed to the mayor, aldermen and common council, it was moved to quash it for this direction, because it seemed to infer that the mayor and aldermen were no part of the common council: the court said, "here is nobody in this direction who must not join in the act; this is only repeating the several constituent parts of the corporation; and the mentioning the entire common council after the mayor and

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corporation, is but a repetition *quoad* the mayor and aldermen." (*Pees v. Mayor, &c. of Leeds*, 1 Stra. 640.) Where a mandamus was sued out to commissioners of highways, it was held, that it need not be directed to them by their individual names in the first instance, it being only in case of disobedience to the writ that they were liable to be proceeded against personally. (*People v. Champion*, 16 Johns. R. 61.)

§ 51. 2. And where the writ is directed to a corporation or select body, it must not only be directed to them in their proper name, but also in their proper capacity, and the application for it must state plainly in what capacity it is intended that the writ should be directed to them. (Bac. Ab. Mandamus, F. *Papilion and Dubois*, Skin. 64. *Rex v. Westlove*, 3 Barn. & Cresw. 685. S. C. 5 Dowl. & Ry. 599.) Thus the direction of a writ to the members of a "town council should be by their corporate name, for that is their legal description as long as they continue to have a corporate existence. (*Rex v. Smith*, 2 M. & S. 598. See *Rex v. Mayor of Abingdon*, 1 Ld. Raym. 559. *Rex v. Mayor of Hereford*, 2 Salk. 701. Bull. N. P. 204, (a.) *Regina v. Mayor of Gloucester*, Holt, 451. *Pees v. Mayor of Leeds*, Str. 640.) If, however, a mandamus were directed to the members of a corporation, instead of the corporation by its corporate name, the objection would be valueless, if not taken *in limine* on a motion to quash. It could not prevail after the return. (*Fuller v. The Plainfield Academic School*, 6 Conn. 532. See *Regina v. Bailiffs of Ipswich*, 2 Salk. 434.)

3. Nor will this writ be directed to one who has not the power to execute it. (*State v. Dunn*, Minor, 46.)

If the writ be wrongfully directed, such misdirection may be specially returned, (*Regina v. Bailiffs of Ipswich*, 2 Salk. 434,) and the court will grant a *superseas quia improvide emanavit*, (*Rex v. Corporation of Wigan*, 2 Burr. 782. See further, on the subject of direction, *Queen v. Mayor of Derby*, 2 Salk. 436;) or it may be superseded on motion. (*Rex v. Norwich*, 1 Stra. 55. *Rex v. Hereford*, 2 Salk. 701. *Rex v. Abingdon*, 1 Ld. Raym. 560. *Rex v. Smith*, 2 M. & S. 598.)

§ 52. III. Of the body of the writ. The writ should contain all those facts which are necessary to show that the party applying for it is entitled to the relief prayed for. (*Rex v. Justices of West Riding, &c.* 7 Term R. 52. *Rex v. Bishop of Oxford*, 7 East, 345.) The title of the relator to the relief sought must be clearly and distinctly stated in the alternative mandamus, so that the facts alleged may be admitted or traversed; it is not enough to refer in the writ to the affidavits and other papers on file, in which the order for the mandamus was made; though such reference is allowable to show the amount of a sum of money claimed, but not the right of the relator thereto. Therefore, where an alternative mandamus was directed to the canal commissioners, directing them to pay the president, &c. of the commercial bank of Albany certain moneys "according to the order and certificate of the canal board and assignment to the bank mentioned in the affidavits on file in our supreme court of judicature, or signify to us the cause to the contrary thereof," &c., it was held, that it was bad, and that the reference to the affidavits, &c.

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did not help it. (*Commercial Bank of Albany v. Canal Commissioners*, 10 Wend. 25, 32.) The writ should also set out the duty to be performed, but as "no precise form is necessary in a mandamus," (Per Lee, C. J. in *Rex v. Mayor of Nottingham*, Sayer, 37,) it need not be particularly stated by what authority this duty exists. (*Rex v. Ward*, Str. 897. *Rex v. Betterworth*, id. 857. *Rex v. Nottingham*, Sayre. 37. *Peat's case*, 6 Mod. 310. *Rex v. Whiskin*, Andr. 1. *Anon.* 2 Mod. 316. Bull. N. P. 204. (a.) *Rex v. Margate Pier Company*, 3 B. & A. 223. 2 Chitt. 256. 3 Steph. N. P. 2321.) Thus, a mandamus to elect, and afterwards to swear the elected into office, may be included in one writ. (*Rex v. Mayor of Abingdon*, 1 Ld. Raym. 553.) A mandamus to choose and swear a mayor is taken *reddendo singula singulis*. (*Rex v. Mayor of Tregony*, 8 Mod. 11.) In cases of admission, the title of the person claiming to be admitted should be suggested in the writ, (*Peat's case*, 6 Mod. 310,) and the nature of the office; (*Rex v. Ward*, Str. 895.) To admit a freeman, the writ should be *ad privilegium, not ad locum et officium*, (*Rex v. Morris*, 1 Ld. Raym. 338.) But it is not requisite to aver, that it is the person's duty to whom the writ is directed to admit or swear the applicant into office. (*Rex v. Ward*, Str. 895.) In commanding a person to undertake an office, it is sufficient to show the general liability of the defendant to serve, and to allege that he was elected, and without reasonable cause refused to undertake it; but it is unnecessary to aver, that he was able and fit to serve. (*Rex v. Merchant Tailors' Company*, 2 Lev. 200. Willcock on Corporations, 394. 1 Stephens' Corporation Acts, 2d ed. 467.) If the production of records be the object of the writ, they need not be specifically described; a general description is sufficient. In the Nottingham case, (*Rex v. Nottingham*, 1 Sid. 31,) the writ was to deliver "*evidentias*," ("*et auter choses queuz fueront express per general parolls*." (3 Steph. N. P. 2321, 2322.) Where the plaintiff, in a writ of mandamus, averred that the corporation was established by the name of trustees, &c.; that the plaintiff was one of the trustees, duly elected, and enjoyed the rights and privileges belonging to him as trustee, and that he continued to hold and exercise his said office until he was removed therefrom—it was held, that the office of trustee, its tenure and duration, and the privileges appertaining thereto, were sufficiently alleged. (*Fuller v. Plainfield Academic School*, 6 Conn. 532.) Where the plaintiffs, in a writ of mandamus, averred that, in October, 1825, there was, and for more than thirty years antecedent thereto, there had been a corporation established by the legislature of the state, this was held a sufficient averment of its existence on the 14th of February, 1826. (*Ibid.*) An alternative mandamus to a court of common pleas, commanding them to seal a bill of exceptions, need not set forth the bill; and it may be served by copy, at the same time showing the original. (*The People v. Judges of Westchester*, 4 Cowen, 73.)

As to the tests and time of return: these depend so much upon merely local rules, that it is hardly thought necessary to refer to them.

§ 53. If there be any irregularity in the writ, it may be amended at any time before it is returnable. (Bac. Ab. Mandamus, B. *Regina v. Clithero*, 6 Mod. 133. *Rex v. Lyme Regis*, Doug. 135.) But the court will not amend it after

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a return, particularly if that return has been traversed. (*Rex v. Mayor, &c. of Stafford*, 4 Term R. 689.) Under the English practice, the amendment is made by a judge's order. (*Rex v. Free Burgesses*, cited 1 Gude Crow. Prac. 193. See also 3 Steph. N. P. 2325.) It has also been held, that if there be a mistake, the prosecutor may quash his mandamus, and have a new one before it is returned. (*Horsenail's case*, Mic. 18 Geo. III. 1 Gude. Crow. Prac. 191.)

§ 54. We will now consider upon whom, and in what manner service of the alternative mandamus is to be made. Under the English practice, the original writ and copies must be served personally upon the party or parties to whom such writ is directed; and in the event of its being necessary to serve several persons with copies of the writ, the original writ must be shown to every one personally when the copies are served, and the original writ afterwards served personally upon the principal person mentioned therein, it being expressly stated in the original writ that it must be returned to the court, and therefore it must be personally served upon one of the persons required to obey it, that it may be so returned; and you can only proceed against such of the parties for a contempt in not returning the writ, who have either been served with the original writ itself, or a copy of the original writ, the writ itself being shown. (1 Gude Cr. Prac. 163. *Rex v. Mayor of Exeter*, 12 Mod. 251. 3 Steph. N. P. 2325.) Under this rule, the delivery of a mandamus directed to a county court to such of the judges as were sitting in open court, (*Smith v. Dyer*, 1 Call, 562,) and the delivery of a copy of the alternative writ, at the same time showing the original, (*The People v. The Judges of Westchester*, 4 Cowen, 73,) in vacation, (*id.*; *The People v. Herkimer Common Pleas*, 7 Wend. 536,) have been held good service. (See also *Rex v. Corporation of Tynno*, cited 1 Gude Cr. Prac. 192.)

§ 55. After service of the alternative writ, the defendant may move to quash or supersede the same. (See *The People v. Judges of Westchester*, 4 Cowen, 73.) Objections, however, which are merely technical, and do not go to the substance of the relief sought, ought to be urged before a return is made; (*Fuller v. Plainfield Academic School*, 6 Conn. 532; see also *The King v. Mayor, &c. of Ripon*, 2 Salk. 433, pl. 12; *Ld. Raym.* 563; vide *Carthew*, 500, 501;) but it is otherwise with those of a more solid character, which may be taken at any time before the issuing of a peremptory mandamus. Thus, where the writ was directed to a corporation, commanding them to pay a poors' rate, but omitted to state that the defendants had no effects upon which a distress could be levied, it was held to be a fatal omission. (*Rex v. Margate Pier Company*, 3 B. & A. 220. *Taverner's case*, Sir T. Raym. 446. *Townsend's case*, *id.* 69. 1 Lev. 91.) So, likewise, where it was suggested on the face of the writ, directed to an inferior officer of a college, that such college was subject to the power of a "visitor," the writ will be quashed, it being bad on its face, because such a jurisdiction is but a *forum domesticum*, and not taken notice of by the common law, and is a jurisdiction which purely belongs to the visitor. (*Dr. Walker's case*, C. T. A. 212. *Rex v. Whaley*, 7 Mod. 308, 309.)

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"In the case of *The King v. The Mayor of York*, (5 Term R. 74,) Lord Kenyon and Justice Buller said it was too late to take any objection to the writ, after a return thereto. But in this they were clearly wrong, if they intended to apply their remarks to defects of substance. All the authorities, both before and since that decision, show that any defect in substance in the writ, as a want of sufficient title in the relator to the relief sought, may be taken advantage of at any time before the peremptory mandamus is awarded. In the case of *The King v. The City of Chester*, (Holt's R. 438,) the court considered the return insufficient and contradictory; but they quashed the writ because that was bad also. In *Rex v. The College of Physicians*, (5 Burr. Rep. 2740,) after a return had been made to the writ, the mandamus was quashed because the foundation of the relator's claim, or private statute, was not sufficiently set forth therein. The relators in that case afterwards applied for and obtained another writ, in which the foundation of their claim was stated *in extenso*, and upon a return to this last writ the case was finally decided. So in the recent case of *The King v. The Margate Pier Company*, (3 Barn. & Ald. 221,) the counsel for the relator admitted that the relator's title was not set out with sufficient certainty in the writ, but as a return thereto had been made, he insisted that the objection came too late. He relied also upon the authority of *The King v. The Mayor of York*, to sustain that position. But Abbott, Ch. J. decided it was not too late to take an objection to the writ; that if the material facts on which the relator founded his claim were not stated in the writ, it would deprive the defendant of the power of traversing them; for the defendants were only to answer what was alleged in the writ." (Per Walworth, Chancellor, in *Commercial Bank of Albany v. Canal Commissioners*, 10 Wend. 25, 31, 32. See also *Rex v. Bristol Dock Company*, 6 Barn. & Cresw. 189.)

The motion is founded upon some error or defect, as for instance, misdirection; (*Rex v. Mayor, &c. of Norwich*, 1 Str. 55; *Rex v. Mayor, &c. of Abingdon*, 2 Salk. 699; *Reg. v. Mayor, &c. of Hereford*, id. 701; see *Rex v. Smith*, 2 Maule & Selw. 598; *Pees v. Mayor, &c. of Leeds*, 1 Strange, 640; Bac. Abr. Mandamus, F.;) or a misjoinder of interests in bringing the writ; (Bac. Abr. Mandamus, B.; 2 Salk. 436, pl. 19; Comb. 307; S. C. 5 Mod. 11; S. C. 2 Salk. 433, S. P.; see also *Rex v. Mayor of Kingston-upon-Hull*, 1 Str. 578, 8 Modern, 209; *Rex v. Wildman*, 2 Strange, 893;) or some defect that renders the writ *felo de se*; (*King v. Dr. Walker*, Ca. temp. Hard. 212; Bac. Abr. Mandamus, B.;) or when the writ has been sued out in violation of the intention of the court: thus, where a rule has been obtained for a mandamus to issue, and the mandamus is taken out in other terms than is warranted by the rule, and differing not merely by adding things incidental to a mandamus, but materially enlarging the terms, the court will quash the writ. (*Rex v. Water Eaton*, 2 Smith, 54. And see *Rex v. Tucker*, 3 B. & C. 345.) In Bacon's Abridgment, (Mandamus, B.) it is said that "the writ cannot be superseded after the return is out, neither can the party move to quash it before a return made and filed." To supersede or quash the writ, a notice of motion must always be given. (*Anon.* 1 Wils. 30. 3 Steph. N. P. 2324.) That the motion to quash may be made by the prosecutor before a return, see *supra*, § 53.

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§ 56. If no return be made, the court will grant an attachment against the persons to whom the mandamus was directed ; with this difference, however that where a mandamus is directed to a corporation to do a corporate act and no return is made, the attachment is granted only against those particular persons who refuse to pay obedience to the mandamus ; but where it is directed to several persons in their natural capacity, the attachment for disobedience must issue against all, though when they are before the court the punishment will be proportioned to their offence. (*Rex v. Churchwardens and Overseers of Salop*, Hil. 8 Geo. II. Buller's Nisi Prius, 201. 1 Gude Cr. Prac. 189. *Mayor of Coventry's case*, 2 Salk. 429.) If a mandamus be directed to a "town council," and they adjourn the corporate assembly in order to prevent the return being made, the members will be punishable for contempt. (*Regina v. Sir Gilbert Heathcote*, 10 Mod. 56.) If an attachment issues for not returning a mandamus, and the sheriff, who is to serve the process, takes bail thereupon, this is a misdemeanor for which an attachment will be granted against him ; for these are not like attachments in chancery, for want of an answer, which are only as attachments of process, but are writs on contempt, in nature of executions, and so not bailable by the sheriff. (*The King v. Baskerville, Sheriff of Shropshire*, Mich. 9 Geo. II.*

§ 57. The writ is to be returned by him to whom it is directed ; and if any other return it in his name, without his privity and consent, an action on the case lies against him : also, it is an offence for which the court will grant an attachment.† (*Skin*. 368, pl. 15. *Carth*. 500. *Comb*. 422. 2 *Show*. 504, pl. 465. *Bac. Abr. tit. Mandamus*, G. See also 2 *R. Stat. of N. Y.* 2d ed. p. 486, § 54.) An ex-corporate officer cannot make the return, unless the election of his successor be void, because, when corporate officers have sworn in successors who have not been legally chosen, they notwithstanding continue

* By the Revised Statutes of the State of New York, (vol. 2. 2d ed. p. 486, § 54,) it is provided that "whenever any writ of mandamus shall issue out of the supreme court, the person, body, or tribunal, to whom the same shall be directed and delivered, shall make return to the first writ of mandamus ; and for a neglect so to do, shall be proceeded against as provided in the thirteenth title of the eighth chapter of this act." The mode of proceeding referred to (see 2 *Rev. Stat.* 2d ed. p. 440-446,) is by attachment under the statutory provisions, concerning proceedings as for contempts to enforce civil remedies, and to protect the rights of parties in civil actions.

By § 59 of the statute first referred to, it is provided that "the supreme court, or any justice thereof, shall have the same power to enlarge the time for making a return and pleading thereto, and filing any subsequent pleading, as in personal actions."

† Therefore, if a mandamus be directed to the mayor, &c., and the mayor, who is the most principal and proper person, return and bring in the writ, the court, upon affidavits, will not examine whether there was the sense of the majority, but will receive it, and leave the parties to punish the mayor for the misdemeanor, if he be guilty ; but a peremptory mandamus will be granted if the return be falsified. (*The King v. Mayor, &c. of Abingdon*, *Carth*. 499. *S. C.* 1 *Ld. Raym.* 559. *S. C.* 2 *Salk.* pl. 9 ; and leave granted by the court to file an information against the mayor. *Bac. Abr. tit. Mandamus*, G.)

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corporate officers, and therefore ought as such to make a return to the writ. (*Regina v. Town of Clitheroe*, 6 Mod. 133.) A return is good, though there be neither the hand of the mayor or seal of the corporation to it, because, before the Statute of York, the sheriff need not set his hand to any return; and if the return be false, an action can be brought against the whole body politic for making a false return, and against a particular person for procuring a false return. (*Lydston v. Mayor of Exeter*, 12 Mod. 126. *Rex v. St. John's College*, Skin. 368. 3 Stephen's Nisi Prius, 2326. Com. Dig. Mandamus, D. 1.)

§ 58. We have already seen, (§ 52,) that the alternative mandamus should contain all those facts which show the title of the applicant to the relief prayed for. Some violation or neglect of legal duty must be shown in the person to whom it is directed; and if this be omitted, the writ may be quashed or superseded. But if the writ be sufficient and the defendant does not desire to do the act directed by it, he may then make a return. The return must state with certainty those facts which constitute a defence to the mandamus. It ought to contain a full and certain answer to all the allegations expressly made in the petition for it, and to disclose a just and legal reason why the mandamus should not be obeyed. (*The Inhabitants of Springfield v. The County Commissioners of Hampden*, 10 Pickering, 59.)

But certainty to a certain intent in general is all that is requisite here, which means what, upon a fair and reasonable construction, may be called certain, without recurring to *possible* facts, which do not appear. If the return be certain upon the face of it, that is sufficient, and the court cannot intend facts inconsistent with it, for the purpose of making it bad. If presumptions were to be allowed, certainty in every particular would be necessary, and no man could draw a valid and sufficient return. Besides, presumption and intendment, as far as they go, must be in favor of returns, not against them. (Per Buller, J., Dougl. 159. See *Rex v. Mayor of Monmouth*, 4 Barn. & A. 497. *Rex v. Mayor of Carmarthen*, 1 Maule & S. 697. See also *Rex v. Corporation of Dublin*, Batty, 628.) It has been said, that in point of form a return requires the same certainty and precision necessary in declarations and other pleadings; (*Brosius v. Reuter*, 1 Harr. & Johns. 551;) or in an indictment or return to a writ of habeas corpus. (*Rex v. Mayor of Lyme Regis*, Dougl. 157, 158.) In the case of *The King v. The Mayor, &c. of Cambridge*, (2 T. R. 456, 461,) Buller, J., in alluding to a return of two repugnant causes, observes, "it is like a declaration in which two inconsistent counts are joined."

Therefore, if to a mandamus to the Lord President and Council of the Marches, to admit a person to the exercise of office of deputy secretary, the return is, that *non fuit tempore receptionis brevis deputatus constitutus*; this is naught; for if he were made his deputy before, the return was true, unless he made him his deputy at the very instant of the receipt of the writ. (*The King v. Clapham*, Vent. 110. Bac. Abr. Mandamus, I) So where a mandamus was granted to restore the recorder of Barnstable, directed to the mayor of the corporation, and he returned, *quod non constat nobis* that he was

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ever elected; the return was adjudged insufficient, and restitution awarded. (Raym. 153. Id.) So a return to a mandamus to restore a parish clerk was held bad, because, though it appeared that the offences charged were sufficient grounds of removal, it was not stated that he had been summoned to answer the charge before his removal. (*Rex v. Gaskin*, 8 Term Rep. 209. And see 1 Bing 357.) So if a writ set forth all the proceedings of the election, and conclude, "by reason whereof A. was elected;" it is a bad return to say "that he was not elected;" the defendant should traverse one of the facts alleged. (*Rex v. Mayor, &c. of York*, 5 Term Rep. 66.) So where a mandamus commanded defendant to take upon himself the office of common councilman in a borough, and the defendant returned, that by a by-law persons refusing to fill the office were subject to a fine, and that defendant had paid the fine, the return was held bad; since it did not show that the fine was in lieu of service, and a peremptory mandamus was awarded. (*Rex v. Bower*, 1 Barn. & C. 585.) So, where to a mandamus to restore a town clerk, it was returned, that he *nunquam debito modo admissus fuit*; it was held a bad return, being a negative pregnant, and involving matter of law, when the plain fact only should be returned, so as to enable the court to adjudge upon it, and the party to bring his action, in case it were false. (Sid. 209. Keb. 655, 716, 723.) So where a writ of mandamus, to certify the election of a recorder, stated, that the corporation, being duly assembled, proceeded to the election of a recorder; a return, that they were not duly assembled to proceed to the election of a recorder, was holden bad, as being a negative pregnant. (*Rex v. Mayor, &c. of York*, 5 Term Rep. 66. Bac. Abr. Mandamus, I. Com. Dig. tit. Mandamus, D. 5.) So a return *non fuit debito modo electus* is bad, for it is a negative pregnant; (Com. Dig. *ut sup.*;) unless indeed the mandamus suggests that he was *debito electus*, in which case the return is good, because it answers the suggestion in the writ. So it is an insufficient return to say, *Quod ante advent. brevis fuit electus pro anno, et ad finem anni amotus*, without saying at what time. (5 Mod. 10.) That B. had so many votes, and the plaintiff only so many. (R. Mod. Ca. 309.) So, that A. and B. were not elected, without saying *nec aliquis eorum*. (R. Mod. Ca. 89.) Or, they ought to make a special return, that a custom was claimed to elect two, or that they had equal votes, or are jointly elected, &c. (Per Holt, Mod. Ca. 89.) So, if it says, *quod procuraverunt A. cum summonere*; for that is not direct that he was summoned. (1 Vent. 19.) That he was heard *de aliis criminibus ei objectis*, without saying, what, before whom, or in what place. (Semb. 5 Mod. 258.) That he was *auditus in communi concilio*, without saying, by whom, &c. (5 Mod. 258.) That he did not account for money to the corporation, without saying that he was requested and refused. (5 Mod. 259. Com. Dig. *ut sup.*) Where several causes returned to a mandamus are inconsistent, the whole must be quashed, because the court cannot know which to believe, and it is an objection to the whole return. It is like a declaration in which two inconsistent counts are joined; there, the plaintiff cannot have judgment. But where a return consists of several independent matters not inconsistent with each other, some of which are good at law, and some bad, the court may quash the return as to such as are bad, and put the prosecutor

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to plead to or traverse the rest. (*Rex v. Mayor, &c. of Cambridge*, 2 Term Rep. 456. *Rex v. Mayor, &c. of York*, 5 Term Rep. 66. *Rex v. Archbishop of York*, 6 Term Rep. 493.) Where an amotion is returned, the return must set out all the necessary facts precisely, to show that the person is removed in a legal and proper manner, and for a legal cause. It is not sufficient to set out conclusions only; the facts themselves must be set out precisely, that the court may be able to judge of the matter. And so it is as to the *cause* of amotion; that must be set out in the same manner, that the court may judge of it. (Per Lord Mansfield, 2 Burr. 731. Bac. Abr. tit. Mandamus, I. Com. Dig. tit. Mandamus, D. 4.) Therefore, it is not a sufficient return to a mandamus to restore one to his standing as a member of a corporation, that he was tried and expelled "by a select number of the society," without showing by what authority this select number acted. (*Green v. The African M. Episcopal Society*, 1 Serg. & Rawle, 254.) So where to a mandamus to restore J. S. to the place of common councilman of L., the defendants returned generally the cause of the amotion by the common council, who were in due manner met and assembled, the court held the return to be bad; for that they were so duly assembled was a conclusion of law; that they should have set out the facts, viz. that they had as a select body the power of amotion; that all the members were summoned by regular and proper notice; and that J. S. himself was also regularly summoned and heard in his defence. (Per Lord Mansfield, 2 Burr. 731.) So, if the amotion were by a part of a corporation, the return should show how they have such authority, whether by charter or prescription; for as the power of amotion is by the general law in the whole corporation at large, it should appear how the select part is entitled to it. (*Rex v. Mayor, &c. of Doncaster*, Say. 37. *Rex v. Feversham*, 8 Term Rep. 356.) It should also appear on the return that the body removing had *proved* the charge for which the person was removed. To state merely that he was present when the charge was made, and did not deny it, is not sufficient. (*The King v. The Company of Fishermen of Feversham*, 8 Term Rep. 352.) Also the return is insufficient, if it does not state that the party had been summoned to answer the charge before he was removed. (*The King v. Gaskin*, 8 Term Rep. 209.) But the power of amotion being generally in the whole corporation, it is obvious, that if it is stated, that the party was removed by the corporate body at large, it is unnecessary to aver that the power was vested in them. (*Rex v. Lyme Regis*, Dougl. 149.) A return in general terms is bad; as, that party had obstinately refused to obey the rules and orders of the corporation, contrary to the duty of his office, without stating what the rules and orders were. (*Rex v. Mayor, &c. of Doncaster*, 2 Ld. Raym. 1564.) So a return of removal for neglect of duty, without stating the particular instances of neglect, has been holden to be bad. (Say. Rep. 37.) So a return to a mandamus stating in the words of the writ, that the prosecutor was *not, duly elected, admitted and sworn*, was holden to be bad. *Secus*, perhaps, if it had not been duly elected, or admitted, or sworn. (*Rex v. Lyme Regis*, Dougl. 79. Bac. Abr. Mandamus, I. Com. Dig. Mandamus, D. 4. Steph. Nisi Prius, 2327, 2329. Harrison's Dig. tit. Mandamus.) So the return of a mandamus to restore a minister to his place and functions was held insuffi-

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ent, in not setting forth with precision and certainty the rules, laws, canons, &c. of the church of the said minister. (*Brosius v. Reuter*, 1 Har. & J. 551.) So "bringing a law suit contrary to the rule of the society" was held insufficient, because the return should further aver that the suit was not necessary.

§ 59. On the other hand, to a mandamus to admit a person to an office, the defendant may return that the applicant was not qualified, or that he was not elected. (Bac. Abr. Mandamus, I. *Rex v. Williams*, 8 Barn. & Cresw. 81.) So a return to a mandamus to justices to hear and determine a complaint before them "that it was determined," has been held valid. (*Rex v. Richardson*, 1 Wils. 21.) So in answer to a mandamus to elect, it is a good return that a person has been "duly elected and sworn into office," it being sufficiently positive as to the principal fact. (*Rex v. Williams*, Sayer, 140.) A return that a party was not duly elected sexton according to ancient custom, "and there is a custom for the inhabitants, &c. to remove at their will and pleasure, and that the party was removed pursuant to such custom," is good. (*Rex v. Churchwardens of Taunton*, Cowp. 413.) So to a mandamus requiring A. to deliver to the churchwardens certain books, &c. in his custody, it is a good return to say, that on and since the teste of the writ, A. had not nor has had the books, &c. or any of them in his custody, power, or possession. (*Rex v. Round*, 5 N. & M. 427. 1 H. & W. 546.) "*Non fuit electus*," is a good return. (*Rex v. Mayor of Colchester*, 1 Sid. 210.) "*Non fuit electus*," (*Regina v. Corporation of Corn*, 11 Mod. 174; *Regina v. Twitty*, 7 Mod. 84; *Regina v. Borough of Aldborough*, 10 id. 101,) "*non debito modo electus et praefectus ad officium*," (*Rex v. Lambert*, 12 Mod. 2; *Rex v. Mayor of York*, 5 T. R. 66,) that some other individual instead of the applicant had been elected; (*Rex v. Williams*, Sayer, 140,) and a return that the complainant has resigned—are valid and sufficient returns. (*Rex v. Mayor of Rippon*, 1 Ld. Raym. 564. *Rex v. Tidderley*, 1 Sid. 14. 3 Steph. N. P. tit. Mandamus. Bac. Abr. tit. Mandamus, I. Com. Dig. tit. Mandamus, D. 3.) It is a good return to a mandamus nisi, for the distribution of proceeds of ministerial lands in Ohio, that, before the application, the money was all distributed. (*Universal Church v. Trustees*, 6 Ham. 445.) And upon the petition of a town for a mandamus to county commissioners, compelling them to supervise and finish a part of a certain highway previously laid out, an alternative mandamus was issued, to which the commissioners made return that the part mentioned had been commenced and dedicated by the town with the aid of individuals voluntarily, and without expectation that the town would be remunerated by the county; and the return was held good. (*Springfield v. Hampden*, 10 Pick. 59.) So a return made to a mandamus, by B. G. and the others, as "late township committee," is sufficient. (*State v. Griscom*, 3 Halst. 136.) And where an alternative mandamus had been directed to a town clerk, commanding him to record the survey of a road pursuant to the act, (1 N. R. L. 270, sec. 24, c. 186,) or show cause; and the clerk returned, that he did not record the survey, because one of the commissioners had signed the survey by the name of Zaccheus Higby, whereas he was elected by the name of Zaccheus Higby, junior; and because the commissioners had not

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taken the oath of office, and filed a certificate of the oath with the clerk according to the act; it was held, that the return was insufficient, and a peremptory mandamus was awarded. (*The People v. Collins*, 7 Johns. R. 549.) And the omission of a date to the return to a peremptory mandamus directed to B. G. and others, township committee, commanding them to "assign and appoint in writing to the overseers of the highways of the township or some of them, their several limits or divisions of the road for opening, clearing out, amendment and repair," will not vitiate a notice. Though the mandamus is directed to B. G. and others as township committee, yet a return made by them as late township committee, is sufficient. Though the writ commanded the committee to assign "to the overseers, or some of them, their several limits," &c. the assignment to one overseer is a substantial compliance with the command of the writ. If there is reason to believe that the assignment is fraudulent and evasive, and designed to defeat the purpose of the opening and repair of the road, the court will allow the party a rule to show cause why the return should be quashed on those grounds. (*The State v. Griscom*, 3 Halst. 136.)

§ 60. We have before seen, that if a return be certain to a common intent, that is sufficient, and we may here add that the court will not intend inconsistent facts for the purpose of making it bad; (*Rex v. Mayor of Lyme Regis*, Doug. 157; *Manaton's case*, Sir T. Raym. 365; *Rex v. Mayor of Doncaster*, Sayer, 39; *Glide's case*, 4 Mod. 35; *Rex v. Mayor of Abingdon*, 2 Salk. 431; Holt, 436-441; 3 Stephen's Nisi Prius, 2326;) nor will they require that the right claimed in the writ be negatived, if it be admitted subject to a material qualification. (*Rex v. Corporation of Dublin*, Batty, 628.) If the supposal of the writ be false in not truly stating the constitution of the corporation, the return ought to deny the constitution as being that which is mentioned in the writ. (*Rex v. Bailiffs of Malden*, 2 Salk. 431.)

§ 61. The court at common law may receive a return without a verification by the oath of the party; (1 Sid. 227;) or they may require such verification. (Pal. 455. *Ld. Ray*. 365.) The return need not be signed by or on behalf of the party making it, and if it be made by a corporation, it is said that it need not be signed by the head thereof; (1 Salk. 192; *Skin*. 368;) nor made under the common seal. (See *Com. Dig.* tit. *Mandamus*, 2.)

§ 62. The return having been made and filed, it may be necessary for the defendant to amend it. It is said, that clerical mistakes may be amended after the return is filed; (*Rex v. Lyme Regis*, Doug. 135; Willcock on *Corpn.* p. 2, pl. 272, *et seq.*;) but amendments are allowed with caution; and, therefore, after a verdict on a traverse to the return, the court would not allow the defendants to amend the return by setting forth a different constitution of the corporation. (*The King v. Mayor of Grampound*, 7 T. R. 699.) In regard to motions by the defendant to quash his return, Lord Holt remarks in an anonymous case in 12 Mod. (page 410,) "if an officer make an ill return, he

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shall be amerced, and we will not allow him to quash the ill return and make another."

§ 63. By the common law, the plaintiff was not at liberty to traverse the return, even though it might be false in fact, but the remedy was either by an action on the case for a false return, or, if the matter concerned public government and no particular person was so far interested as to maintain an action, by information against the particular persons that made the return. (See *supra*.) But the statute of 9 Anne, ch. 20, permitted the return to be denied in certain cases, which it is unnecessary to state here at large. The Revised Statutes of New York extending the principle of the statute of Anne, provide that whenever a return shall be made to this writ, the person prosecuting such writ, may demur or plead to all or any of the material facts contained in the said return; to which the person making such return, shall reply, take issue or demur; and the like proceedings shall be had therein for the determination thereof, as might have been had, if the person prosecuting such writ had brought his action on the case for a false return; and that issues of fact joined in any such proceeding, shall be tried in the county within which the material facts contained in the mandamus, shall be alleged to have taken place. (2 R. S. 2d ed. 486, §§ 55, 56.) And a similar provision suggested by the statute of Anne existed previous to the revision. (*The People ex rel. Shuvert v. Champion*, 16 Johns. 61.) In regard to the practice under this statute, Mr. Justice Sutherland observes:—"Although these statutes contemplate formal written pleadings in the ordinary mode of conducting suits, the practice of the court is virtually to allow pleadings *ore tenus*; that is, the relator is permitted to discuss the return, and to ask for a peremptory mandamus, and whilst he does not put in a *formal demurrer*, the case is considered as embraced in the description of *non-enumerated* business, and is heard as such; but if a formal demurrer is interposed, it becomes enumerated business, and can be heard only at the stated terms. It is optional with a relator whether it shall be considered *enumerated* or *non-enumerated* business, unless the court specially direct formal pleadings to be interposed. No injury can result to the defendant in consequence of this privilege allowed the relator, for if he wishes to carry up the cause for review, the court permits him, after its decision, to make up and file formal pleadings, so that a record may be made up; which privilege, however, is not granted to the relator, who has chosen to ask for a peremptory mandamus, without formally demurring; if dissatisfied with the decision of the court, he cannot carry up the cause for review." (*The People ex rel. Bentley v. Commissioners of Highways of Hudson*, 6 Wend. 560.) But although the relator may either demur or traverse, on a return to a mandamus, he is not at liberty to do both; and, therefore, though he may be ruled to plead or demur to the return within twenty days, (*The People v. The Cayuga Common Pleas*, 10 Wend. 632,) he cannot be ruled to do both. (*Vail vs. The People*, 1 Wend. 38.) In regard to demurrer, it has been said that a relator will not be allowed to demur specially to a return; and, therefore, where the relator having obtained an alternative mandamus, commanding the judges of the common pleas of New York to sign and seal a

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bill of exceptions which had been tendered to them, or to show cause, and the judges made return that they refused to seal the bill without the same should contain all the evidence relating to the matters of law therein excepted to, and which they alleged the bill did not contain. And to this return the testator demurred specially, that in the return it is not alleged that the bill does not contain all the evidence material and necessary to present the question of law raised by the bill. And a motion was now made on the behalf of the judges of the common pleas to set aside the demurrer, on the ground that no demurrer can be put in in such cases. The court said:—"The motion must be granted. This court will not permit subordinate tribunals to be harassed with special demurrers to returns made by them. If a relator is dissatisfied with a return made, conceiving it to be evasive, or the construction of any matters alleged in it to be of doubtful character, upon suggestion of its insufficiency, a further or supplementary return will be ordered, and thus the rights of a party as effectually protected as if he were permitted to demur specially." (*The People ex rel. Musgrove v. The N. Y. Common Pleas*, 9 Wend. 429.) It is, however, difficult to perceive why such a demurrer is not within the statute, and even if it were not, it is presumed that under the new rules, the form of a demurrer to a return must be special.

But notwithstanding a rule to plead or demur to the return may have been taken, the relator may apply on due notice at a special term for a peremptory mandamus, as if no such rule had been entered. (*The People v. Cayuga Common Pleas, ut sup*) The prosecutor can reply to a return to a mandamus; (*Rex v. Mayor of Lyme Regis*, Doug. 159;) and that which is not answered upon the return, must be looked upon as admitted to be true. (*Reg. v. Corporation of Buckingham*, 16 Mod. 174.) And where the prosecutor of a mandamus to which a return had been made, moved for a *concilium*, and the court upon argument adjudged that the return was sufficient in law, it was held, he could not afterwards traverse the facts contained in the return. (*Rex v. Mayor and Aldermen of London*, 3 B. & Ad. 255.) The prosecutors of a mandamus moved to take the return off the file on affidavit, and on objections made against the validity of the return itself. The court, after argument on the law and facts, ordered in general terms that the rule should be discharged. The defendant then traversed the return. On motion to take the traverse off the file, because judgment had already been given in favor of the validity of the return, it was held, that the prosecutors were entitled to traverse. (*Regina v. Payn*, 11 A. & E. 955.)

§ 64. The prosecutor of a mandamus to restore, traversed the facts in the return, and seven issues were joined; but he afterwards deserted his traverse, and set the return down in the paper, to be argued upon its validity in law. It was accordingly argued; but Sir J. Burrow doubted whether this was regular, if the defendants had objected. (*Wilsford v. Mayor, &c. of Doncaster*, 2 Burr. 738.)

§ 65. We have already seen (*supra*, § 57) that a return of inconsistent matters will render the return bad, but a case may arise where several inde-

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pendent matters not inconsistent with each other may be returned, though part of them may be bad in law, and others good. *The King v. The Mayor, &c. of Cambridge*, (2 Term R. 456, 462,) was such a case. It was there returned that Beales was not a burgess; that he was not eligible to the office of common councilman; and that he was not elected. The return was then quashed as to the two first parts, and the prosecutor put to traverse the rest. If on the face of a mandamus there be no ground for the writ, the defect cannot be supplied by matter appearing in the return. (*Regina v. Hopkins*, 1 A. & E. N. S. 161.)

§ 66. If a mandamus were returned many years ago, the court will not permit the return to be traversed *now*, without special affidavits. (*Rex v. Corporation of Swansea*, E. 24, Geo. III. cited in 1 Gude Crow. Prac. 192.)

§ 67. Under the statute of 9 Anne, before referred to, upon issue joined on traverse of return to a mandamus, judgment as in case of nonsuit may be given in the same manner as in an action. (*Wigan v. Holmes*, Sayre, 110. Sayer's Law of Costs, 166. M. 27, Geo. II. and E. 32, Geo. III. *Allen v. Mayor of Stafford*, 4 T. R. 689. 1 Gude Crow. Prac. 192.)

§ 68. We now come to consider the remedies for false return, to which we have before incidentally alluded. Before the statute of Anne, a sufficient return, like the return of a sheriff, could not be called in question in the proceeding in which it was made; but in a case where no one was particularly interested to bring an action for a false return, the court would direct an information. (See 3 Steph. Nisi Prius, 2332. Also a very full collection of the authorities in Augell and Ames on Corporat. 3d ed 676, n. 1. Com. Dig. tit. Mandamus, D. 6, and authorities. Bac. Abr. tit. Mandamus. L. Salk. 374, pl. 16. Lord Raym. 584. *Rex v. Lancaster*, 1 Dowl. & Ry. 485.) In those cases where no right to traverse the return is given by statute, the only remedy of the plaintiff is by an action on the case for a false return. (Bac. Abr. tit. Mandamus, L. Com. Dig. tit. Mandamus, D. 6.) This action may be brought at any time after judgment given upon the return, but not before, (Com. Dig. *ut sup.*) by all those who have made application for the mandamus, (Bac. Ab. Mandamus, L.; 1 Lord Raym. 125,) against all or any one of those who made the return, as against a mayor only where the return was made by the mayor and aldermen; though if it appear in such an action that the mayor voted against the return, but was overruled by the majority, the plaintiff will be nonsuited; (*Rich v. Pillington*, Carth 171, 172; see also 6 Mod. 152;) and it lies as well for a *suppressio veri* as for a *suggestio falsi*; (Doug. 149, 158.) In an action for false return, it cannot be objected that mandamus would not lie, (Lord Raym. 125,) nor that it was directed to a corporation by the wrong name; nor that, on account of the improper direction of the writ, the defendants need not have made any return. (Id. 564. See also Com. Dig. tit. Mandamus, D. 6, n. (e) to Am. ed. of 1325.) Where the return to a mandamus was, that there was neither the hand of the mayor nor the seal of the corporation to it; the court stated, "It is well enough with-

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out it." "If the return be false, you may bring your action against the whole body politic for making a false return, and against a particular person for procuring a false return." (*Lydston v. Mayor of Exeter*, 12 Mod. 126. *Regina v. Chapman*, Holt, 443. *Rex v. Mayor of Rippon*, 1 Lord Raym. 564. *Enfield v. Hill*, 2 Lev. 238.) A declaration sets forth the return properly, which states that it was made "*modo et forma sequenti*;" (1 Ld. Raym. 496;) and no allegation is necessary that it is the duty of the defendant to obey the mandamus. (12 Mod. 322.) In regard to the evidence, the plaintiff must prove the falsity of the return; as for example, when the return is that the prosecutor was not elected, he must show his own title. (*Crawford v. Powell*, 2 Burr. 1013. S. C. 1 Wm. Black. 229. Angell and Ames on Corporat. 679. Willcock on Mun. Corporat. 442.) And again: he must prove that the return was made by the defendants. Proof, that the defendant was served personally with an alias mandamus, and told the person who served him with the writ, "that he should take care that a return was made to it;" and farther, that two rules of court were made—one for an attachment against the defendant for not making a return, and the other to discharge that rule upon paying the costs, and appearing, &c., was held sufficient proof that the defendant made the return. (*Vaughan v. Lewis*, Carth. 229.) In an action for a false return to a mandamus to admit, it was held immaterial on what day the plaintiff laid his election, so that it was before action brought; but that where there is a customary day of election, if the plaintiff does not prove his election on that day, though he has laid it right, yet he must fail. (*Vaughan v. Lewis*, Carth. 228. Angell and Ames on Corporat. 3d ed. 678, and notes.) An action for a false return is local, but may be laid in the county where it was made, or in that in which it appears on record. (*Lord v. Francis*, 12 Mod. 408.) In an action for a false return, no motion is allowed for a peremptory mandamus until four days after the return of the *postea*, because the defendant has that period to move in arrest of judgment. But it may be awarded on the *postea*, without entering a former judgment. (*Rex v. Mayor of Newcastle-upon-Tyne*, 1, East, 116. See also 1 Gude Crow. Prac. 187-212.)

§ 69. Let us now examine the peremptory mandamus, which is the final order of the court that the particular act sought to be comanded be performed. And

I. When it may be issued. Where both parties are heard on a motion for an alternative mandamus, and there is no dispute about the facts, a peremptory mandamus, if it be lawful, will be granted in the first instance, because in such a case there is no necessity for going through the usual forms of the alternative writ, (*Ex parte Rogers*, 7 Cowen, 526, 533, 534; *Ex parte Jennings*, 6 Cowen, 518.) If, however, it is desired to bring error, a peremptory mandamus will be refused at this stage of the proceedings; or if a rule for one has been granted, it will be changed into a rule for an alternative mandamus, so that the facts may be put on record by a return. (*Ex parte Jennings*, *ut sup.* See *Rex v. Dean and Chapter of Dublin*, 1 Strange, 536, where it was decided that no writ of error lay on the

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award of a peremptory mandamus.) Again: where the alternative writ has been regularly served, the court may in their discretion, upon due proof of that fact, order a peremptory mandamus, without compelling a return to it. (*The People ex rel. Tremper v. The Judges, &c. of Ulster*, 1 Johnson R. 64. *The People ex rel. Knapp v. Judges of Westchester*, 4 Cowen, 73.) If, however, the defendants have not had time to make up their return, a further day will be allowed before the peremptory writ issues. (*Id.*)

Again. If the return to the alternative mandamus be insufficient, the peremptory writ may be awarded. (Bac. Abr. tit. Mandamus, M. Com Dig. tit. Mandamus. *The People v. Seymour*, 6 Cowen, 579. *The People ex rel. Bush v. Collins*, 7 Johnson, 549. *Rimkell v. Winemiller*, 4 Harrie and McHen. 429.) So if the return have been falsified in an action upon the case; Bac. Abr. *ut sup.*; Com. Dig. *ut sup.*; or in New York, in case a verdict shall be found for the person suing such writ upon plea to all or any of the material facts in the return; or if judgment be given for him upon demurrer or by default, this writ shall be granted without delay. (2 Rev. Stat. of N. Y. 2d ed. 486, § 57. See also stat. 9 Anne, ch. 10, § 2.

II. Form: In *The People ex rel. the Com. of Highways of Poughkeepsie v. The Supervisors of the County of Dutchess*, (1 Hill, 50,) Justice Bronson remarks that "the peremptory writ, when awarded, should follow the alternative mandamus;" and although he does not extend the remark beyond the particular case then before the court, this may be safely stated as the general rule.

III. Practice: A motion for a peremptory mandamus, on the coming in of a return to an alternative mandamus, is a non-enumerated motion, if the relator has not formally demurred. (*The People v. The Commissioners of Highways of Hudson*, 6 Wen. 559.) It is optional with the relator, whether it shall be considered enumerated or non-enumerated business, unless the court specially direct formal pleadings to be interposed; if he elect to have it considered non-enumerated business, the court, on the application of the defendant, but not of the relator, will give leave, after its decision of the question, to have formal pleadings made up and filed. (*Id.*) On motion for a peremptory mandamus, the court do not look at the affidavits on which the alternative writ was founded; their decision is made solely upon the return to the alternative writ. (*The People v. Hudson*, 7 Wen. 474.) Where an application is made for a peremptory mandamus on the return of an alternative writ, the papers on which the original motion was made must be presented, and the points stated in writing in support of the application. (*The People v. Delaware Common Pleas*, 2 Wen. 255.)

§ 70. The mode of enforcing obedience to the peremptory mandamus is by attachment, which must be moved for upon affidavits showing the right of the applicant to this remedy, and due notice to the defendant. Therefore, where on motion for an attachment against the defendants for not obeying a peremptory mandamus commanding them to seal a bill of exceptions, the affidavit omitted to state the service to have been when the court was sitting, or the persons on whom made, the court denied the motion (*The People v.*

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The Judges of Washington, 2 Caines, 97.) The application for an attachment is made by a motion for a rule *nisi*, founded on affidavits, upon which the defendant may show cause, unless the contempt be gross, when the rule is made absolute at first. (Tidd's Prac. 484; *Chaunt v. Smart*, 1 Bos. & Pul. 477.) Where the peremptory writ was directed to a corporation, an attachment was granted upon proof of a personal service upon the town clerk alone. (*Rex v. Fowey*, 5 D. & R. 614) And in *The King v. Tooley*, (12 Mod. 312,) upon affidavit that the defendant had kept out of the way, so that personal service of a peremptory writ could not be made upon him, and that the writ had been left at his house, the court ordered him to show cause. If a mandamus is served upon all those to whom it is directed, and a motion for an attachment against all of them is made, it is sufficient to produce an affidavit of service of the writ at the time of showing cause upon the attachment; nor is even this necessary, unless required by the other side. But if the writ were served upon some of the members only, and the attachment is moved against them alone, they ought, it seems, to have an opportunity of answering the affidavit of the special service of the writ. (*Rex v. Esham*, 2 Barnard, 265.) Lord Holt says, that there are "two sorts of attachments upon a mandatory writ; the one entitles the party to his action for damages, and that must be upon the *pluries*, and the other punishes the contempt, which may be upon the *alias*. (*Anon.* 12 Mod. 348; *Anon.* 12 Mod. 164. Angell and Ames on Corporat. 3d ed. 682, 683.)

§ 71. By the Revised Statutes of New York, (vol. 2, 2d edition, page 486, § 57,) in case a verdict shall be found for the person suing such writ, or if judgment be given for him upon demurrer or by default, he shall recover damages and costs, in like manner as he might have done in such action on the case for a false return. And on a recovery of damages by virtue of that statute, against any persons claiming to be a corporation, the court may cause the costs therein to be collected, by execution against the persons claiming to be a corporation, or by attachment against the directors or other officers of any such corporation. (Id. § 58.) On trial of a mandamus under 9 Anne, if the plaintiff gets a verdict, he recovers damages as well as costs; but the defendant only recovers costs, he having sustained no damages. (*Ipswich, mandamus to admit Hare*. Mic. 17 Geo. III. 1 Guide Crown Prac. 190. See also id. 176.)

§ 72. In *Ex parte Root*, (4 Cowen, 548,) the court state that the general practice of the court is not to give costs on motion for mandamus, and this especially when such motion is *ex parte*, but nevertheless when the motion is heard upon notice, and is clear against the relator, the court will deny it with costs. (Id.) Nor are costs usually given on granting an alternative or peremptory mandamus on motion. "If the relator wishes to secure costs," (say the court,) "he must go to his demurrer or issue of fact." (*The People ex rel. Holley v. Supervisors of Columbia: The same ex rel. Waterman v. The same*, 5 Cowen, 291.) Where the defendants in an action apply to the supreme court for a mandamus to the judges of the court below, and the plaintiffs oppose the issuing of a peremptory mandamus, and request a return to be

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made to the alternative mandamus, they are not liable to the costs of suing out the writ, although the relators obtain a judgment by default, on a demurrer directed by the court on the return of the writ, the plaintiffs not having appeared or been made parties to the demurrer. (*The People v. Jefferson Common Pleas*, 13 Wend. 649.) Nor in suits and proceedings upon writs of mandamus, is it the practice of the court upon awarding a peremptory mandamus to grant costs against the judges of subordinate courts or other public officers entrusted with the discharge of judicial duties. (*Anon.* 19 Wend. 157.) Though costs are awarded where the judges do not obey the alternative writ, but make a return; in such cases it is presumed they are indemnified by the party in interest. (*The People v. The New York Common Pleas*, 18 Wend. 534.) But costs may be awarded upon the granting of a peremptory mandamus, although no return has been made to the alternative mandamus, and without the appearance of the party to be affected by the proceeding. (*The People v. Onondaga Common Pleas*, 10 Wend. 598.) And a party resisting a mandamus by requiring the relators to plead or demur, and subsequently joining in demurrer, is liable to the costs of the demurrer, on judgment being rendered in favor of the relators. (*The People ex rel. Hale v. Onondaga Common Pleas*, 3 Wend. 301. See *Myers v. Pownal*, 16 Vermont R. 426. See also the following cases cited in Angell and Ames on Corpora. 3d ed. p. 659, n. 5: *Regina v. Bingham*, 4 Adolph. & Ellis, (N. S.) 477; *Regina v. Greens*, id. 646, 650; *Regina v. Sheriff of Middlesex*, 5 ibid. 365; *West London Railway Co. v. Bernard*, 3 id. 873.)

FORMS.

A few forms are here given for the use of the practitioner, for which no apology is deemed necessary.

I. Mandamus to Inferior Tribunals and Judicial Officers.

1.

A general form of an alternative mandamus which may be adapted, (with proper additions,) to any case, court or officer. (Humphrey, 504; see 3 Ld. Ray. Rep. 203, 206, 353, for precedents.)

The people of the state of New York, to [the court, board of supervisors, commissioners of highways, or other officers or persons to whom it is to be directed,] greeting: Whereas, [here recite the facts or statements, briefly, which preceded the *gravamen* or injury.] Nevertheless, you the aforesaid [court, officer or person,] have unjustly, [state briefly the order or proceeding of which you complain,] as we are informed by his complaint. Now therefore, we being willing that full and speedy justice be done in this behalf to him the said as it is just, command you, that immediately after the receipt of this writ you, [insert the thing or matter required to be done, or omitted, substantially according to the order of the court allowing the mandamus,] or that you show us cause to the contrary thereof, lest complaint shall again come to us by your default; and in what manner you shall have executed

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this our writ make known to our said justices of our said court of judi-
 cature on, &c. Witness, &c. [the usual teste.] Clerks.
 ———, Att'y.

2.

Peremptory mandamus thereon.

As in the last form, adding after the words "as we have been informed from his complaint made to us," the words "and which complaint we have adjudged to be true as appears to us of record," and *omitting* "or that you show us cause to the contrary thereof."

3.

Peremptory mandamus to vacate an order setting aside a *fi. fa.* (*Blunt v. Greenwood*, 1 Cowen, 15, 22. *Supra*, § 29.

The people of the state of New York, to the judges of the court of common pleas of the city of New York, greeting: Whereas lately [L. a.] recovered a judgment for the sum of against one which said judgment was entered of record, in the said court of common pleas, on the day of , and upon which said judgment a *feri facias* was issued; and, afterwards, a levy made by virtue of the said *feri facias*, upon the goods and chattels of the said to wit, on the day of ; and whereas, we have been informed, from the complaint of the said , that a rule was granted by you during the last term of the said court of common pleas, setting aside the said *feri facias*, to the great damage and grievance of the said : We, therefore, being willing that due and speedy justice should be done to the said in this behalf, as it is reasonable, do command you, firmly enjoining you, that immediately after the receipt of this our writ, you do, without delay, *vacate and cause to be vacated*, the said rule granted by you at the last term of the said court of common pleas, that the same complaint may not, by your default, be again repeated to us: and how you shall have executed this our writ, make known to us, before our justices of our supreme court of of judicature, at the in the town of in the county of on the next, then and there returning this our writ, upon peril that may fall thereon. Witness, &c. [the usual teste.]

Clerks.

———, Att'y.

4.

The same, to vacate an order setting aside the report of referees. (*Humph.* 503. *Supra*, § 29.

The people of the state of New York, to the judges of the court of common pleas in and for the county of , greeting: Whereas we have been given to understand, in a certain action of trespass on the case pending before you between , plaintiff; and defendant, that a certain report of referees was duly made to you in writing by , the referees appointed in the said action, by which said report the said referees certified that, [here state report substantially, and the amount reported.] Nevertheless, you, the aforesaid judges, have not only unjustly refused to render

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judgment on such report according to the tenor and effect thereof, but have also unjustly set aside and vacated the same to the grievous damage of the said , as we are informed by his complaint, and which complaint we have adjudged to be true as appears to us of record. Now, therefore, we being willing that full and speedy justice be done in this behalf to him the said , as it is just, command you, firmly enjoining that immediately after the receipt of this writ, you set aside and vacate the rule made by you as aforesaid setting aside the report aforesaid of the referees aforesaid; and also that you forthwith render judgment on such report, according to the tenor and effect thereof, lest complaint shall again come to us by your default, and in what manner this our command shall be executed, make appear to our said justices of our said supreme court of judicature, on the day of at , and then sending back to us this our writ. Witness, &c. [the usual teste.] Clerks.

—, Att'y.

5.

Alternative mandamus to restore an attorney. (*Supra*, § 28. 2 R. S. 486, 510. 1 R. S. 221. Humph. 503. See cases, § 28.

The people of the state of New York, to the judges of the court of common pleas, in and for our county of greeting: Whereas, as we have been given to understand, that , Esq. was duly admitted, appointed and licensed to practice as an attorney and counsellor at law of the said court of common pleas, to have and to hold such office so long as he should well demean himself therein. By virtue whereof the said was and is justly entitled to the exercise of the office aforesaid, and to take the fees, perquisites and profits thereof. Nevertheless, you the aforesaid judges, have unjustly removed him from the exercise of such office to the grievous damage of the said as we are informed by his complaint; therefore, we, being willing that full and speedy justice be done in this behalf to him the said as it is just, command you, firmly enjoining that immediately after the receipt of this writ, you restore him to the aforesaid office of attorney and counsellor at law of the said court of common pleas, and permit him to exercise the same, and to take the fees, perquisites and profits thereof, or that you show cause to the contrary before our justices of our supreme court of judicature, at on the day of next, lest complaint shall again come to us by your default; and in what manner this our command shall be executed, make appear to our said justices of our said supreme court of judicature, on the day of at and then sending back to us this our writ. Witness, &c. [the usual teste.] Clerks.

—, Att'y.

6.

Peremptory mandamus thereupon.

As in the last, adding to the words "as we are informed by his complaint," these words, "and which complaint we have adjudged to be true, as appears to us of record." Omit "or that you show cause to the contrary before our

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justices of our supreme court of judicature, at _____, on the _____ day
 of _____ next. *Clerks.*
 _____, *Att'y.*

7.

Alternative mandamus to a court of sessions to hear and determine an appeal
 against an order of bastardy. (2 Gude, 398, *et seq.*)

The people, &c. To _____. Whereas we have been given to
 understand in our court before us that at _____, an appeal was entered
 on the behalf of _____ against a certain order made by _____,
 two justices chosen in and for _____, for filiating on the said _____ a
 bastard child, born of the body of _____; and you the said _____,
 before whom the said appeal was brought as aforesaid, were then and there
 required, on behalf of the said _____, to hear and determine the matter
 of the said appeal, yet you the said _____ before whom the said appeal
 was brought as aforesaid, not regarding your duty in that behalf, did not hear
 and determine the said appeal, nor have you at any time since heard or de-
 termined the same, to the great damage and grievance of the said _____,
 and to the manifest injury of his estate, as we have been informed from his
 complaint made to us; whereupon he hath besought us, that a fit and speedy
 remedy may be applied in this respect; and hereupon we, being willing that
 due and speedy justice should be done in this behalf, as it is reasonable, do
 command you the said _____ that you do proceed to hear and determine
 the said appeal, at _____ or that you show us cause to the contrary
 thereof, lest in your default the same complaint should be repeated to us; and
 how you shall have executed this our writ make known to us at
 on _____ next. Witness, [the usual teste.] *Clerks.*
 _____, *Att'y.*

8.

Peremptory mandamus thereon.

As in the last form, adding after the words "as we have been informed
 from his complaint made to us," the words "and which complaint we have
 adjudged to be true as appears to us of record," and *omitting* "or that you
 show us cause to the contrary thereof."

9.

Alternative mandamus to two justices to take the examination of a pauper
 touching the reputed father of a bastard child. (2 Gude, 407, *et seq.*)

The people, &c. To _____. Whereas we have been given to un-
 derstand in our court before us, that heretofore (to wit) on the _____ day
 of _____ in the year of _____, one _____ having declared her-
 self to be with child, and that such child was likely to be born a bastard, and
 to be chargeable to the county [or town] of _____ in the said county, ap-
 plication was made unto you the said _____ and _____, being two
 of the justices of _____ by and on behalf of the superintendent [or guar-
 dian] of the poor [or commissioners of the alms house,] of the said county, [or
 town,] to take the examination of the said _____ touching the person

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who had gotten her with child, in order that such proceedings might be had thereupon as the law directs, yet you the said and well knowing the premises, but not regarding your duty in that behalf, did then and there absolutely neglect and refuse, and have ever since absolutely neglected and refused to take such examination, in manifest obstruction of justice, and to the great damage and grievance of the said [town or county ;] whereupon they have besought us that a fit and speedy remedy may be applied in this respect ; and we being willing that due and speedy justice should be done in this behalf, as it is reasonable, do command you the said and , firmly enjoining you that immediately after the receipt of this our writ, you do take the examination of the said , touching the reputed father of the said bastard child, in order that such further proceedings may be had thereupon as the law directs, or that you show us cause to the contrary thereof, lest in your default the same complaint should be repeated to us : and how you shall have executed this our writ make known to us at on next, then returning to us this our said writ. Witness, [the usual teste.] Clerks.

—, Att'y.

10.

The peremptory mandamus thereon similar to the last form, with the changes stated in No. 6.

II. *Mandamus to Inferior Officers and Corporations.*

11.

Mandamus to one who has the custody of public papers or documents, to permit a person to inspect and take copies of the same. (2 Gude, 464, 465, 466, 432.)

The People, &c. To ————. Whereas we have been given to understand, in our court before us at , that a certain plaint in replevin is now pending in our said court before us, wherein one is the plaintiff, and one is the defendant, touching the claim or title of the said to a certain right of common and pasturage for all manner of cattle and other commonable rights in, over, and upon the open, common, waste and unenclosed lands and grounds situate, lying and being within the , in the said county of . And whereas we have been also given to understand, in our said court before us, that application hath been made to you, the said , on behalf of the said , to permit and suffer the said , or his attorney or agent, to inspect the papers and public documents whereof you have the custody, so far as the same relate to the matters in question in the said plaint, and to take copies and extracts therefrom ; but that you have absolutely refused to permit the said , or his attorney or agent, or other person on his behalf, to inspect the same, or to take copies or extracts therefrom, to the great damage and prejudice of the said , as we have been informed from his complaint made to us ; whereupon he hath besought us that a fit and speedy remedy may be applied in this respect ; and we, being willing that due and speedy justice should be done in this behalf, as it is reasonable, do command you, the said , and each of you, and

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all and every other person or persons in whose custody or possession the same may be, that you, or such of you in whose custody or possession the same, or any of them, may be, do, immediately after the receipt of this our writ, permit and suffer the said _____, his agent, attorney, or solicitor, to have the sight and inspection of the said papers and other public documents whereof you have the custody, so far as the same relate to the matters in issue in the said plaint, and to take copies or extracts therefrom at his own proper costs and charges, lest by your default the same complaint should be repeated to us: and how you shall have executed this our writ, make known to us at _____, on _____ next, then returning to us this our said writ; and this you are not to omit. Witness, &c. Clerks.

12.

Mandamus to a late clerk to deliver up books, &c. to the present clerk. (2 Gude, 497, 498, 499.)

The People, &c. To _____. Whereas we have been given to understand, in our court before us, that _____, hath been duly chosen, appointed, and sworn into the office of town [or county or other] clerk. And whereas all the public books, records, and muniments of and belonging to the said [town or county] ought to be placed and deposited with, and remain in the custody, power, and possession of the said _____, as such town [or county or other] clerk, for the use and benefit of _____. And whereas we have been also given to understand, in our court before us, that the aforesaid public books, records, and muniments of and belonging to the said [town or county,] have been for a considerable time last past, and now remain in your custody, possession, or power; and application hath been made to you on behalf of the said _____ as such town [or county or other] clerk as aforesaid, that the same should be delivered by you to the said _____, as such town [or county or other] clerk as aforesaid, in order that the same might remain in his custody and possession, as such town clerk as aforesaid, for the use and benefit of _____; yet you, well knowing the premises, but not regarding your duty in this behalf, have absolutely neglected and refused, and still do absolutely neglect and refuse to deliver to the said _____, so being such clerk as aforesaid, the aforesaid public books, records, and muniments of and belonging to the said [town or county,] and on the contrary thereof unjustly detain the same in your custody or power, in contempt of us, to the great damage and grievance of the said _____, and to the great hindrance of the administration of justice within the said [town or county,] as we have been informed from his complaint made to us in that behalf; we therefore, being willing that due and speedy justice should be done in this behalf, as it is reasonable, do command you, firmly enjoining you, that immediately after the receipt of this our writ, you do without delay deliver, or cause to be delivered to the said _____, so being such clerk as aforesaid, all the said public books, records, and muniments of and belonging to the said borough, in your custody, possession, or power, in order that the same may remain in the custody and possession of the said _____, as such clerk as aforesaid, for the use and benefit of _____, or that you show us cause to the contrary thereof,

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lest by your default the same complaint should be repeated to us: and how you shall have executed this our writ, make known to us at _____, on next, then returning to us this our writ. Witness, &c.

Clerks.

13.

Mandamus to compel certain officers, as supervisors, commissioners, &c., to make a rate, tax, or assessment for repaying sums expended in public works or for other purposes. (2 Gude, 434, 438.)

The People, &c. To _____, greeting. Whereas [state the circumstances from which the obligation to make the rate arises] nevertheless you our said [commissioners of sewers] for the said county, not being ignorant of the premises, but little regarding your duty in this behalf, have absolutely refused and still do refuse to make such rate, tax, and assessment, in contempt of us and to the no small damage and injury of _____, as we have been informed from their complaint made to us in that behalf; whereupon they have besought us that a speedy remedy be granted to them; we therefore being willing that a speedy remedy be provided for them in that behalf, as is just, do command you our said _____, by firmly enjoining you, that you do without further delay, in due form of law make and cause and procure to be made a rate, tax, and assessment on all and every person and persons who hath, or have, or holdeth, or hold any lands, tenements, and hereditaments within the said county, [town or city;] [describe the mode in which the rate is to be made;] and that you do all and singular acts, matters, and things necessary, and which you may lawfully do in this behalf, or signify to us good cause to the contrary, lest by your default complaint thereof be again made to us: and in what manner you shall have executed this our writ make appear to us at _____, on _____ next, then returning to us this our writ; and this you or any of you are not to omit on peril that may ensue thereon. Witness, &c.

Clerks.

14.

Mandamus to compel officers, as commissioners, supervisors, justices, &c., to levy a sum assessed on a certain person pursuant to a statute. (2 Gude, 421, 441.)

The People, &c. To _____, greeting. Whereas [state the circumstances out of which the obligation to levy the sum assessed arises] nevertheless you the said _____, well knowing the premises, but not regarding your duty in this behalf, did then and there absolutely neglect and refuse, and have ever since absolutely neglected and refused, to issue such warrants [or warrant] as aforesaid, as we have been informed from the complaint of the said collectors [or other persons] made to us; whereupon they have besought us that a fit and speedy remedy be applied in this respect; and we, being willing that due and speedy justice should be done in this behalf, as it is reasonable, do command you, the said _____, firmly enjoining you, that immediately after the receipt of this our writ, upon proof made upon oath of the demand made by the said collectors as aforesaid of the said sum of _____ so assessed upon the said _____ as aforesaid, and of the non-payment thereof,

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you [or one of you, if the warrant of one be sufficient] do issue your warrants [or warrant,] authorizing and directing the said collectors to levy the said sum of so assessed upon the said as aforesaid, and so in arrear and refused and neglected to be paid as aforesaid, together with the costs attending the same (to be ascertained by you, [or one of you] by distress and sale of the goods and chattels of the said , pursuant to the directions of the said statute, or that you show us cause to the contrary thereof, lest in your default the same complaint should be repeated to us: and how you shall have executed this our writ make known to us at , on next, then returning to us this our said writ. Witness, &c. Clerks.

15.

Mandamus to a person to take upon himself the office of mayor.

The People, &c. To ———, Esq, greeting: Whereas, we have been given to understand in our court before us, that heretofore (to wit) on now last past, you the said , were in due manner elected into the office of mayor of , to serve in the same office for the space of one whole year, then next following, of which election you the said then and there had notice; and it then and there became and was the duty of you the said , so being elected as aforesaid, to take the oath for the due and faithful execution of the office of mayor of the said [town or city], and to take upon yourself and execute the said office of mayor of the said town for the residue of one whole year, computed from , now last past; yet you the said , well knowing the premises, but not regarding your duty in this behalf, have absolutely neglected and refused, and still do absolutely neglect and refuse to take the oath for the due and faithful execution of the office of mayor of the said town, [or city,] and to take upon yourself and execute the office of mayor of the said town, [or city,] in manifest obstruction of public justice within the said town, and to the great damage and grievance of the inhabitants thereof, as we have been informed from the complaint of , made to us; whereupon they have besought us that a fit and speedy remedy may be applied in this respect; and we, being willing that due and speedy justice should be done in the premises, as it is reasonable, do command you, the said , firmly enjoining you, that immediately after the receipt of this our writ, you do take the oath for the due and faithful execution of the office of mayor of the said town, [or city,] and that you do take upon yourself and execute the said office of mayor of the said town, for the residue of one whole year, computed from the said day of now last past, or that you show us cause to the contrary thereof, lest the same complaint should by your default be repeated to us: and how you shall have executed this our writ, make known to us at , on next, then returning to us this our said writ. Witness, &c. Clerks.

16.

Mandamus to restore one of the common council of a city. (2 Gude, 545.)

The People, &c. To the citizens of the common council of our city of , and to every of them, greeting: Whereas, was duly elected, sworn, and

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admitted into the place and office of one of the common council of our said city of _____, in which said place and office he, the said _____, always behaved and governed himself well, yet you, the said citizens of the common council of our said city, without any reasonable cause, have unjustly removed the said _____ from the said place and office of one of the common council of our said city, in contempt of us, and to the no small damage and grievance of him, the said _____, [and to the manifest lessening of his estate,] as we have been informed from his complaint made to us in that behalf: we therefore being willing that due and speedy justice be done, in this behalf, to the said _____, (as it is reasonable,) do command you, that immediately after the receipt of this our writ, you do restore, or cause to be restored, the said _____ into the said place and office of one of the common council of our said city of _____, together with all the liberties, privileges, and franchises to the said place and office of one of the common council of our said city belonging and appertaining, or that you show us cause to the contrary thereof, that the same complaint may not by your default be repeated to us: and how you shall have executed this our writ, make known to us at _____, on _____, then returning to us this our said writ. Witness, &c. *Clerks.*

17.

Mandamus to elect a mayor. (2 Gude, 500, 503, 505, 507, 510, 511, 512, 515, 516, 518, 520, 522, 524.

The People, &c. To _____, greeting: Whereas, [set out the circumstances out of which the obligation to elect arises,] and we have been given to understand in our court before us, that on _____, now last past, being the day appointed for the election of a mayor of the said town [or city] as aforesaid, no election was made of a mayor of or for the said town [or city] for the present year, [pursuant to the direction of the statute in such case made and provided,] nor hath any election of a mayor of or for the said town [or city] been since at any time made, as we have also been given to understand in our said court before us, to the manifest hindrance and obstruction of public justice within the said town [or city]: we therefore, being willing that a due and speedy remedy should be applied in this behalf, as it is reasonable, do command you, the said [mayor, aldermen, and commonalty] of the said town [or city,] firmly enjoining you, that every of you having a right to vote or be present at, or to do any other act necessary to be done in order to the election of a mayor of the said town [or city] do, upon _____, the _____ next, between the hours of _____ o'clock in the morning, and _____ o'clock in the afternoon of the same day [assemble yourselves in some convenient place or places within the said town [or city] of _____, and that being so assembled, you [describe here in what manner the election is to be held] do then and there, according to your authority in that behalf, respectively proceed to the election of a mayor of the said town and borough for the residue of one whole year, to be computed from _____, now last past: and that you, and every of you, do every act necessary to be done in order to such election [pursuant to the statute in such case made and provided;] and that such of you to whom the same of right belongs, do administer or cause to be administered to the

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person who shall be so elected into the said office, the oath for the due and faithful execution of the said office, [and that you do admit or cause to be admitted the same person into the said office of mayor of the said town, [or city,] with all the liberties, privileges, and franchises to the said place and office belonging and appertaining, and do all other acts necessary to be done in order to and for the completing the said election, pursuant to the directions of the statute in such case made and provided, or that you show us cause to the contrary thereof, lest by your default the same complaint should be repeated to us: and how you shall have executed this our writ make known to us at , on , then returning to us this our said writ. Witness, &c.

Clerks.

18.

Mandamus to elect an alderman in the place of one who has left the country.

The people of the state of New York, by the grace of God free and independent, to the mayor, aldermen and commonalty of the city of New [L. a.] York, greeting: Whereas, on the first day of November last past, and for the two succeeding days, an election was duly held according to law in the fifth ward of the said city, for the purpose of electing an alderman and other officers of the said fifth ward, according to the charter of the city of New York, and the statutes amending the same, and whereas at the said election, David Rogers had a majority of votes for alderman of the said ward; whereupon the said D. Rogers was entitled to, and ought to have qualified himself to become a member of the common council of the said city by appearing and taking the oath or oaths by law provided, but on the contrary thereof the said D. R., soon after the said election took place, and in the said month of November, and before the first day of January last past, departed from the United States for the island of St. Croix, in the West Indies, without having ever qualified himself by law to assume the office of alderman of the said fifth ward. And whereas, the said D. R. has ever since been, and still is absent from the United States, whereby the said fifth ward is not fully represented in the said common council, and manifest injustice is done to the residents and electors in the said fifth ward, as has been suggested to us by the complaint of J. B. Schmelzel, J. R. Manley, G. Conklin, George Arnold, D. Banks, and Benj. Briggs, residents and electors in the fifth ward. And whereas, we have been informed by the said complaint, that by reason of the premises aforesaid, the office of alderman of the said fifth ward is now vacant, and that it is proper, expedient and necessary that an election for alderman of the said ward should be had without delay; therefore, being willing that due and speedy justice should be done in this behalf, as it is reasonable, we do command you, by firmly enjoining you, that immediately after the receipt of this our writ, you do without delay cause an election to be held for the purpose of choosing and electing an alderman of the said fifth ward, pursuant to the charter and the acts of the legislature of the state of New York, in such case made and provided, or signify to us the contrary thereof, that the same complaint may not, by your default, be again repeated to us, and how you shall have executed this our writ, make it appear before our justices of

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our supreme court of judicature, at the academy in the town of Utica, on the first Monday of July next, and this you are not to omit on peril that may fall thereon. Witness, John Savage, Esq., chief justice, at the City Hall, in the city of New York, the 15th day of May, in the year of our Lord, 1830.

Fairlie, Hubbard, Bridge and Oliver, Clerks.

J. A. Dunlap, Att'y.

HASKINS *against* SEBOR.

Where the plaintiff stipulates to try the cause at the next circuit court, but does not, and the defendant neglects to move for judgment as in case of nonsuit, at the next term after the default, it is a waiver of the default; and the plaintiff will be entitled to stipulate anew, if the motion is made at a subsequent term.

Issue was joined in this cause, in February term last, and in April term the plaintiff stipulated to try the cause at the next circuit, which was held in July last : but did not bring on the cause to trial, though younger issues were tried.

Pendleton, for the defendant, now moved for judgment, as in case of nonsuit.

B. Livingston, contra.

Per Curiam. As the defendant did not apply at the July term, but has suffered two terms to elapse, since the defendant's default, he must be considered as having waived the default, and the plaintiff is *freed from his stipulation. This being, then, as it were, the first application, the plaintiff is entitled to a new stipulation; and the motion must be denied. [*218]

Rule refused.(a)

(a) See Grah. Prac. 2d ed. 616-618, 619.

Nixen v. Hallett and Bowne.

NIXEN *against* HALLETT AND BOWNE.

Where a material witness for the plaintiff unexpectedly went abroad, so that he could not be subpoenaed at the trial, it was held a sufficient excuse for the plaintiff, for not proceeding to trial pursuant to his stipulation.

PENDLETON, for the defendants, moved for judgment, as in case of nonsuit, in this cause, as the plaintiff did not try the cause at the last November circuit, pursuant to his stipulation.

Troup, contra, read an affidavit, stating that a material witness for the plaintiff, residing in New York, went on a voyage to sea, some time in October, which was not known to the plaintiff, or his attorney, until the beginning of November, when it was too late to procure his attendance at the circuit; but that he was expected to return before the next circuit.

Per Curiam. We think the plaintiff has shown a sufficient excuse for not proceeding to trial; and he may stipulate anew, on payment of the costs of the last circuit.

Motion denied.(a)

[*219] *JACKSON, *ex dem.* GANSEVOORT, *against* MURRAY.

Where a verdict is taken, subject to the opinion of the court on a case stated, the counsel for the plaintiff opens the argument of the cause.

A VERDICT having been taken for the plaintiff in this cause, subject to the opinion of the court, on a case made; a question was raised by the counsel, which of them was to open the argument, on the motion for a new trial.

Per Curiam. Where a verdict is taken for the plaintiff, subject to the opinion of the court, on a case stated, it is to

(a) See note (a) to *Torrey v. Mershon*, *supra*, vol. 1, p. 242. Also, *Gr. Prac.* 619, 620.

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be considered so far in the nature of a special verdict, that the counsel for the plaintiff is to open the argument.(a.)

Van Vechten, for the plaintiff.

Cady, contra.

BOGART against M'DONALD.

A declaration was allowed to be amended by increasing the damages in the conclusion, on payment of costs.

IN the writ and declaration in this cause, the damages were laid at 600 dollars. The defendant was in custody, and filed a *cognovit* for 600 dollars.

Riggs, for the plaintiff, now moved for leave to amend the declaration, by striking out 600, and inserting 1200 dollars. The suit was on a note for pounds, and the mistake arose by inserting dollars, instead of pounds.

**Cady*, contra.

[*220]

Per Curiam. It is clearly a mistake ; and as there is no bail in the cause, no injury can arise from allowing the amendment. Courts are liberal in granting amendments, for the furtherance of justice. The motion is granted, on payment of costs, and with liberty to the defendant to plead *de novo*.

Rule granted.(b)

(a) Where a verdict is taken for the plaintiff, subject to the opinion of the court on a case to be made, and the plaintiff does not make up the case according to the rules and practice of the court, the defendant may give notice of the motion at the next term for judgment ; and if no sufficient excuse is then shown by the plaintiff for not making the case, the court will order judgment to be entered for the defendant. (*Jackson v. Case*, 12 Johns. R. 431. *The Eagle v. Alner*, *supra*, vol. 1, p. 332. Grah. Prac. 2d ed. 675.) The party making the case must bring it to argument. (*Percival v. Jones*, *supra*, vol. i. p. 393. *Colem*. 104. Grah. Prac. 2d ed. *ut supra*.)

(b) By the common law, judicial tribunals are required to allow amendments which will conduce to the purposes of justice. And therefore they possess discretionary power, at every stage of the proceedings, to grant the right to amend upon such terms as they may judge proper. (*Horston v. Shilli-*

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ter, 6 J. B. Moore, 490. *Taylor et al. v. Lyon*, 2 Moore & Payne, 586. See *Penny v. Van Cleef*, 1 Hall R. 165. *Grah. Prac.* 2d ed. 649.) This power, as we shall hereafter see, has been in some degree controlled both in England and this country by statutory provisions, for the purpose of securing substantial rather than technical justice. Let us examine, in this note, some of the cases in which the rules of amendment have been considered in reference to declarations.

§ 1. *Generally as to the right.*

A declaration may be amended at any time, so long as the proceedings remain on paper; (*Havers v. Bannister*, 1 Wils. 7; see *Aubeer v. Barker*, 1 Wils. 149;) that is, until judgment signed, and during the term in which it is signed; for until then, the proceedings are considered only as *in fieri*, and consequently subject to the control of the court. (*Gra. Prac.* 2d ed. 649. 2 Burr, 756. 3 Bl. Comm. 407. 1 Salk. 47; 2 id. 546; 3 id. 31. 1 Dowl. Pr. Cas. 657.) And there is no difference in this respect, between penal and other actions; (1 Doug. 114;) and the court will accordingly permit the plaintiff in a penal action to amend, even after the time limited for bringing another action, provided there have been no unnecessary delay upon his part, and that the amendment required do not introduce any new cause of action. (6 T. R. 543; 10 B. & C. 689.) After the term of which judgment is signed, the pleadings, &c. cannot be amended at common law, but by virtue of the statutes of amendments only. (Co. Lit. 260; see 2 Str. 1011. *Grah. Prac.* 2d ed. 649; see *Mathews v. Smith*, 1 Hodges, 175. *Jones v. Edwards*, 3 Mees. & Wels. 218. 6 Dowl. 369.) The sole object of amendment being to obtain substantial justice, but few general rules can be stated. As a general rule, an amendment will be granted wherever it can clearly be done without injustice, and where the party applying for it has not by his own negligence lost the right. (See *Mathews v. Smith*, cited *supra* in a criminal case. *Regina v. Hewins*, 9 Carr. & Payne, 786.) Thus where plaintiff has been misled by defendant as to the nature of a charter party, the court permitted plaintiff to amend by striking out a count in covenant on the charter party, and declaring for freight, not upon the charter party; and this after many years had elapsed since the commencement of the action, the defendant having been the cause of the delay. (*Alywin v. Todd*, 1 Bing. N. R. 170.) And in an action against the sheriff for taking insufficient pledges in a replevin bond, the court allowed the declaration, which was in the common form, to be amended, (upon payment of costs,) by alleging, instead of a recovery in the original action, a reference by the consent of the sureties and the defendant, and the result of that reference; and also by adding a new count. (*Dale v. Gordon*, 3 M. & Scott, 339.) And where the particulars showed the exact amount claimed, the judge allowed the declaration to be amended, by increasing the sums stated in each count. (*Dew v. Katz*, 8 C. & P. 315.) So where in *assumpsit* the declaration stated the undertaking to erect a building, and fit it up according to certain plans, by a day stated, for the sum of £20, plea *non assumpsit*, and that the agreement was rescinded; the contract proved was for the erecting certain seats (for the coronation) to be com-

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pleted four or five days before, &c., for the sum of £25, and it appeared that no plans were ever agreed upon; held, that the judge properly allowed the record to be amended according to the true contract, it not being material to the merits of the case. (*Ward v. Pearson*, 5 Mees. & W. 16; and 7 Dowl. 382.) So in an action by executors, the defendant pleaded in abatement the non-joinder of one executor (who had not proved.) The court allowed the proceedings to be amended, on payment of costs, as the statute of limitations would have been a bar to a fresh action. (*Lakin v. Watson*, 2 Dowl. P. C. 633.) And the court will give the plaintiff leave to do so in a civil action, even against a prisoner; but they will not permit him to add new counts to his declaration in such a case. (*Owens v. Dubois*, 7 T. R. 698.) And where, in an action for a breach of promise of marriage, the declaration contained three counts, the first to marry on request, the second within a reasonable time, and the third generally. On a motion to amend the declaration, by inserting a new count to marry on a particular day, the court ordered the first count to be amended, by striking out the promise to marry on request, and introducing a particular day therein, although the declaration had been filed more than two terms before the application was made, and directed the costs of such application to abide the event of the cause. (*Horston v. Shilliter*, 6 J. B. Moore, 490.) So the court allowed several avowries in replevin to be amended by altering the name and description of the *locus in quo*, and stating the holding to have been for a year instead of half a year, and also by adding new avowries, varying the amount of the rent; although issue had been joined and notice of trial given and countermanded, and more than two terms had elapsed previously to the application for the amendment. (*Prior v. Duke of Buckingham*, 8 J. B. Moore, 584.) So where a party was described as a foreign subject, but was not said expressly to be an alien, which was necessary to give the circuit court of the United States jurisdiction in the cause, the plaintiff was allowed to amend. (*Michaelson v. Denison*, 3 Day, 294.) Where a plaintiff, on leave to amend, struck out a count, erroneously supposing he had a better remedy for the cause of action on which it was founded, and took judgment on the remaining counts, he was permitted, on a review of the first action, to restore that count, having first unsuccessfully attempted his other supposed remedy. (*Parker v. Parker*, 17 Mass. 376.) Where the declaration in ejectment laid the demise, by mistake, before the death of the person, whose death gave rise to the controversy, leave was given to amend. (*Coates v. Hamilton*, 2 Dall. 256.) Where the plaintiff declared on a note, and for money paid, and for work and materials, he was allowed to file a statement on a due-bill and book account. (*Fairchild v. Dennison*, 4 Watts, 258.) An amendment of a count in slander, changing the words from one language to another in which they were spoken, is demandable of right by the plaintiff. (*Rahauser v. Schwerger Barth*, 3 Watts, 28.) And informalities in the names of parties may be corrected, on appeals from justices of the peace. (*Graham v. Vandalore*, 2 Watts, 131. *Bratton v. Seymour*, 4 Watts, 329.) So on payment of costs from the commencement of the action, the plaintiff was allowed, in Maryland, to amend his declaration from *assumpsit* to *trover*. (*Kirwan v. Raborg*, 1 Har. & J. 296.) And

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in Alabama, whatever is amendable in the inferior court will be considered, in the supreme court, as amended. (*Boddie v. Ely*, 3 Stew. 182. See also *Hook v. Turnbull*, 6 Call, 85. *Smith v. Jackson*, Paine, 486.)

A declaration in ejectment may be amended, as in other actions; (*Den v. Smith*, 2 Pen. 710; *Lounsbury v. Ball*, 12 Wend. 247;) as, by alleging the date of the demise. *Anon.* 3 Halst. 366. (*Den v. Smith*, 2 Pen. 710. *Blackwell v. Patton*, 7 Cranch, 471.) Thus where the declaration laid the demise, by mistake, before the death of the person, whose death gave rise to the controversy, leave was given to amend. (*Coates v. Hamilton*, 2 Dall. 256.) So an amendment of a declaration, by enlarging the term, was allowed on payment of costs. (*Cockshot v. Hopkins*, 2 Dall. 97. *Wood v. Galbraith*, 2 Yeates, 536.) But the court will not allow an amendment, by enlarging the term, where after judgment the term expires, if there has been great laches and delay, and another party has come into possession. (*Gardiner v. Wilson*, 2 Yeates, 186. *Campbell v. Gratz*, 6 Binn. 115.) A new demise may be added, on terms, viz. that the defendant have twenty days after service of the amended declaration, to elect whether he will continue to defend; and should he elect to defend, then he is to have the costs usual in cases of amendment, and twenty days from the time of making such election, to plead *de novo*, or abide by his former plea. If he elect to proceed no further, then to receive all his costs up to the day of making such election. (*Anonymous*, 2 Caines, 260, 261. *Et vide* Coleman, 49. *Jackson v. Murray*, 1 Cow. 156.) It has also been decided that after six years' service of the declaration, leave was given to amend, by adding new demises, only on the plaintiff's paying all the costs already incurred, in case the defendant should choose to relinquish his defence. (*Jackson v. Kough*, 1 Caines, 251. 18 Johns. 510.) Again, the defendant may, at any time, move to have the demise of a lessor, who died before the commencement of the action, struck out of the declaration, without costs; (*Jackson v. Reynolds*, 1 Caines, 20; *Jackson v. Ditz*, 1 Johns. Cas. 392; S. C., Coleman, 102; *Jackson v. Bankcroft*, 3 Johns. 259; *Elliot v. Bohannon*, 5 Monr. 123;) or a lessor may be struck out of the declaration, on affidavit of his having no interest in the premises; (*Jackson v. Slover*, 10 Johns. 363;) though, under special circumstances, the court will permit his demise to be retained; (*Id.*;) and several new demises have been permitted to be added where there was a subsisting title in the added lessors; (*Jackson v. Travis*, 3 Cowen, 356;) though the plaintiff will not be permitted to amend his declaration, by inserting a demise from a person who has no claim of any subsisting title to the premises in question. (*Jackson v. Richmond*, 4 Johns. 483.) In ejectment, an amendment, so as to enlarge the term laid in the declaration, will be permitted, in the discretion of the court. So the notice at the end of the declaration in ejectment, may be amended after service, by striking out one day and inserting another. (*Den v. Laning*, 4 Halst. 254.) And where there was an actual entry and lease for the purpose of avoiding a fine, and the demise in the declaration was by mistake laid on the first instead of the sixth of May, the court granted leave to amend, but allowed the defendant to elect in twenty days whether to defend or not; and if he chose to defend, then to have the costs of the amendment only; but if he

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abandoned his defence, then he was to be entitled to costs to the time of his election. (*Lion v. Burtis*, 18 Johns. 510.) A declaration cannot be amended by inserting new lessors, nor by adding new demises dated after action brought. (*Dudley v. Grayson*, 6 Monr. 260. *Currie v. Tebbs*, 5 Monr. 442.) In a writ of entry, a parcel of land, described in the count as an entire tract, was demanded. But only a part of it was in dispute between the parties, and that part was within the tenant's enclosure; the residue being within the enclosure of the demandant. After a plea of an entry by the demandant, pending the suit in abatement of the writ, it appearing that the demandant had only entered upon the parcel of the land which was within his own enclosure, the court permitted the demandant to amend his count, so as to confine his demand to the parcel within the tenant's enclosure, upon terms; (*Wilson v. Eaton*, 5 N. Hamp. 141; S. P., *Somes v. Skinner*, 16 Mass. 357;) and a demandant in a writ of right, having counted on his own seisin within forty years, may amend by substituting thirty; (*Holmes v. Holmes*, 2 Pick. 23;) and in an action of ejectment in which, according to the provisions of the laws of Tennessee, the defendant was held to bail, the declaration stated two demises, one by N. and K., citizens of Pennsylvania, the other by B. and G., citizens of Massachusetts. The cause coming on before a jury, the plaintiff suffered a nonsuit, which was set aside, and the court, on the motion of the plaintiff, permitted the declaration to be amended by adding a count on the demise of S., a citizen of Missouri. The parties went to trial without any other pleading, and the jury found for the plaintiff on the third or new count, and a judgment was rendered in his favor. Held to be valid. (*Wright v. Hollingsworth*, 1 Pet. 165.)

Where a suit is commenced by filing and serving a declaration, such declaration is amendable as of course, like one filed after process. (*People v. Monroe C. P.* 5 Wend. 105.) New notice of the rule to plead need not be given after amendment of a declaration as of course. (*Anon.* 4 Wend. 197.)

In South Carolina, a party is generally entitled to amend in form or substance, on paying costs, if the other party be not thereby delayed or surprised. In matters of form, amendments are allowed only where the previous part of the record affords something to amend by; but in matters of substance, the amendment must conform to the facts, as to which the previous parts of the record cannot often be a guide. (*Jenkins v. Hutchison*, 2 Hill, 626. See also *Cates v. Cureton*, Harper, 400. *Philips v. M'Masters*, 2 Rep. Con. Ct. 261.) An amendment, however, will not be allowed after the cause has gone to the jury. (*Glenn v. M'Cullough*, 2 M'Cord, 212. See also 2 Hill, 626.)

But where the defendant may have been prejudiced by the contract not having been properly stated, the judge will not allow the variance to be amended; (*Ivey v. Young*, 1 M. & Rob. 545; and 5 Dowl. 450;) and where it is manifest that no good declaration can be made, a plaintiff shall not have leave to amend. (*Brown v. Beauchamp*, 5 Monr. 417.) After the plaintiff had discontinued a former action, and commenced a new suit, which had been four times noticed for trial, the court would not allow him to amend by substituting or adding a new count; (*Sackett v. Thompson*, 2 Johns. 206;) and an amendment of a declaration was refused when it was too late for the de-

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fendant to have an imparlance. (*Proprietary v. Pearce*, 1 Har. & M'Hen. 223.)

Amendments of the declaration are permitted in penal as in ordinary actions. (*Barber v. McHenry*, 6 Wend. 516. See 1 Doug. 114. 6 T. R. 643. 10 B. & C. 689.)

It is error, in Pennsylvania, to refuse an amendment of a declaration so as to conform it to the instruments offered in evidence. (*Commonwealth v. Meckling*, 2 Watts, 130. See also *Smith v. Boyer*, 2 Watts, 173.) But this rule is not applied to amendments offered after a judgment against the plaintiff, on a demurrer. (*Burk v. Huber*, 2 Watts, 306.) So in ejectment, if the lease laid in the declaration has expired, it is error in the court to refuse an amendment by enlarging the term. (*Maus v. Montgomery*, 10 S. & R. 192.) But in *Walden v. Craig*, (9 Wheaton, 576,) on a writ of error to the circuit court of Kentucky, which had denied a motion to enlarge the term in an action of ejectment, Chief Justice Marshall observed: "The proceedings are all fictitious, fabricated for the mere purposes of justice, and there is every reason for allowing amendments in matters of mere form. There is peculiar reason in this case, where the cause has been protracted, and the plaintiff kept out of possession beyond the term laid in the declaration, by the excessive delays practised by the opposite party. The cases cited by the plaintiff's counsel in argument are, we think, full authority for the amendment which was asked in the circuit court, and we think the motion ought to have prevailed. But the course of this court has not been in favor of the idea that a writ of error will lie to the opinion of a circuit court, granting or refusing a motion like this. No judgment in the cause is brought up by the writ, but merely a decision on a collateral motion, which may be renewed. For this reason, the writ of error must be dismissed."

§ 2. Generally as to the statutes of amendment.

At common law, judgments were constantly liable to be arrested for mere errors of form, (Steph. Pl. 97; 2 Reeves, 448; 3 Black. Comm. 447,) but this abuse has been long remedied by certain statutes passed at different periods, commonly called *the statutes of amendments and jeofails*, by the effect of which judgments at the present day cannot in general be arrested for any objection of form. (Id.) These statutes, so called from *J'ay faillé*, an expression used by the pleader when he perceived a slip in his proceeding, are, in England, the following, viz.: 14 Ed. III. c. 6; 9 Hen. V. ch. 4; 4 Hen. VI. ch. 3; 8 Hen. VI. ch. 12, 15; 32 Hen. VIII. ch. 30; 18 Eliz. ch. 14; 21 Jac. I. ch. 13; 16 and 17 Car. II. ch. 8; 4 and 5 Anne, c. 16; 5 Geo. IV. c. 13. (Id. app. p. xxxvii.) They have been substantially re-enacted in the United States, and the decisions of the courts have always been controlled by their equitable provisions. The New York statute, so far as it applies to the amendment of declarations, is as follows: After judgment rendered in any cause, any defects or imperfections, in matter of form, contained in the record, pleadings, process, entries, returns, or other proceedings in such cause, may be rectified and amended by the court, in affirmance of the judgment, so that such judgment shall not be reversed or annulled; and any variance in

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the record, from any process, pleading or proceeding, had in such cause, shall be reformed and amended, according to such original process, pleading or proceeding. (2 R. S. 424, sec. 4.) And when a verdict shall have been rendered in any cause, the judgment thereon shall not be stayed, nor shall the judgment upon such verdict, or any judgment upon confession, default, *nihil dicit*, or *non sum informatus*, be reversed, impaired, or in any way affected, by reason of the following imperfections, omissions, defects, matters or things, or any of them, in the pleadings, process, proceedings or record, namely: For any variance between the original writ, bill, plaint, and declaration, or between either of them: for any mispleading, miscontinuance or discontinuance, insufficient pleading, lack of color, jeofail, or misjoining of issue: for the want of any allegation or averment, on account of which omission, a special demurrer could have been maintained: (and see 2 R. S. 352, sec. 4-6;) for omitting any allegation or averment of any matter, without proving which, the jury ought not to have given such verdict: for any mistake in the name of any party or person, or in any sum of money, or in the description of any property, or in reciting or stating any day, month or year, when the correct name, time, sum, or description, shall have been once rightly alleged, in any of the pleadings or proceedings: for the want of any right venue, if the cause was tried by a jury of the proper county: the omissions, imperfections, defects and variances, in the preceding section enumerated, and all others of the like nature, not being against the right and justice of the matter of the suit, and not altering the issue between the parties, or the trial, (7 Wend 351,) shall be supplied and amended by the court where the judgment shall be given, or by the court into which such judgment shall be removed by writ of error; (2 R. S. 425, sec. 8;) and these provisions extend to all actions in courts of law. (Id. § 10. See Statutes of Ohio, ed. 1841, p. 687; Statutes of Tennessee, ed. 1836, p. 88, 89; Rev. Stat. of Massachusetts, 449, 606, 553, 569, 608; Stat. of Maine, 498, 499; Id. of Mississippi, 458, 459, 461, 462; Id. of New Jersey, 986, 987, 988; Id. of Indiana, 456, 457; Id. of Pennsylvania, by Dunlop, 188, 189; Id. of Kentucky, 337, 340.)

In England, the statutes of 9 George IV. and 3 and 4 William IV. ch. 42, allow many amendments to be made which were unknown to the common law and the statute of jeofails. It is not necessary, however, to state their provisions here. (See the older statutes, 3 Evans' Statutes, ed. 1836, by Granger, 39, 40, 207, 208, 209. Also 1 Crabb's Digest, 75, *et seq.*; 1 Granger's Supplement to Evans, 443, *et seq.*; 411, 462.)

§ 3. New cause of action not permitted.

Amendments being discretionary with the court, and, as we have seen above, (*supra*, *intro*.) allowed at every stage of the proceedings in furtherance of justice, (see also *infra*, §§ 4, 5,) the courts will permit any amendment of the declaration either in form, (2 Str. 1162,) or in substance, (2 Burr. 1098; 1 Wils. 7; Grah. Prac. 2d ed. 654,) as the justice of the case seems to require. But this general principle is to be taken with one important qualification, namely, that the amendment does not introduce any new substantive cause of action against the defendant. Thus where the plaintiff, under leave to

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amend, adds new counts which contain no new cause of action, but only vary the manner of statement in a count which was demurred to, the court of common pleas will not order them to be struck out. (*Brown v. Crump*, 1 Marsh. 609. 6 Taunt. 300. *Sweeting v. Halse*, 4 Man. & Ryl. 383. See also *Wiley v. Moore*, 2 Wend. 254.) And where a plaintiff declared in slander for words charging him with mal-practice as a physician, he was permitted after the cause was twice noticed for trial, to amend by adding words of the same character on payment of the costs of a new plea or notice of justification, should the same become necessary, and also on payment of the costs of the motion; but he was not allowed to amend by adding words charging him with being a quack or practising without a diploma, as there was a probability that the latter words were barred by the statute of limitations. (*Weston v. Worden*, 19 Wend. 648. *Sever v. Smith*, 18 Johns. R. 310.) Under the statute of Pennsylvania of 1806, and the rules established by the supreme court of Massachusetts and Maine, the true criterion for determining whether an amendment is admissible is this—whether the amendment is of another cause of controversy; or whether it is the same contract or injury, and a mere permission to lay it in a manner which the plaintiff considers will best correspond with the nature of his complaint, and with his proof and the merits of his case. (*Cassell v. Cooke*, 8 S. & R. 287. *Newlin v. Palmer*, 11 S. & R. 102. *Haynes v. Morgan*, 3 Mass. 208. *Eaton v. Ogier*, 2 Greenl. 46.) The plaintiff cannot introduce an entirely new cause of action. But if he adhere to the original cause of action, he may add a count substantially different from the declaration. (*Cunningham v. Day*, 2 S. & R. 1. *Rodrigue v. Curcier*, 15 S. & R. 81. *Ebersoll v. Krug*, 5 Binn. 53. 3 Mass. *ubi. sup.* *Ball v. Clafflin*, 5 Pick. 303. *Swan v. Nesmith*, 7 Pick. 220. 1 Miles, 67.) And so in Connecticut, Vermont, and New Hampshire. (*Ross v. Bates*, 2 Root, 198. *Carpenter v. Gookin*, 2 Verm. 495. *Butterfield v. Harrell*, 3 New Hampshire R. 201. *Edgerly v. Emerson*, 4 New Hampshire R. 147.) Thus in an action against the defendant as endorser of two promissory notes, where it appeared that the notes declared on were not due at the time of instituting the action, it was held that an amendment introducing five other notes, entirely different as to dates, sums, and (as regarded two of them) the name of the drawer, was not admissible, although it was contended that the notes proposed to be substituted were originally intended to be the subject matter of action, but were omitted by mistake, and although the statute of limitations would intervene to prevent a fresh suit upon them. (*Farmers and Mechanics' Bank v. Israel*, 6 S. & R. 294.) Nor can a declaration for work done be amended by stating the breach of a special agreement by the defendant to employ the plaintiff. (*Diehl v. M'Glue*, 2 Rawle, 337.) Where a declaration laid, that the defendant was indebted to the plaintiff for subscription to a canal company, with interest, it was held that an addition of a count, demanding the penalty of five per cent. per month, under the act of assembly incorporating the company, was a matter of substance, and not within the provisions of the act of 1806. (*Canal Company v. Parker*, 4 Yeates, 363.) An amendment of a declaration in slander, by adding a count for a malicious prosecution, will not be allowed under the act. (*Shock v. M'Cheaney*, 4 Yeates,

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507.) And in an action against a sheriff for returning bail when no bail was taken, the plaintiff cannot amend by adding a count for not delivering up the bail bond mentioned in the sheriff's return. (*Eaton v. Ogier*, 2 Greenl. 46.) And where a merchant in New York sold goods there, and received the purchaser's negotiable note in full for the goods, which note was afterwards lost. In assumpsit on an account annexed for goods sold and delivered, it was held, that the plaintiff could not amend by inserting a count upon the note, the note and the account being different causes of action; but that he was entitled to recover on the original count, the giving of the note not being by the laws of New York a payment. (*Vancleef v. Therasson*, 3 Pick. 12.) And upon the same principle, a declaration on the statute of 1788, c. 16, charging A. one of the defendants, with spending and using his property while imprisoned on execution, and the other defendants with aiding him in spending, using, and secreting it, cannot be amended by adding a count at common law charging defendants with a conspiracy to enable A. to transfer and conceal his property in order to defeat the creditor. (*Mason v. Waite*, 1 Pick. 452.) So the plaintiff will not be permitted to alter a count in trover for a bond by alleging conversion of instruments of writing not under seal. (*Tryon v. Miller*, 1 Whart. 11.) Where there is no proof applicable to one of the counts in the declaration, the court will not give leave to amend the declaration. (*Dyson v. West*, 1 Har. & J. 567.) And if the declaration sets forth a joint and several bond, it cannot be amended by adding a count setting forth a joint bond of the defendant and another. (*Postmaster v. Ridgway*, Gilpin, 137.) So where a declaration, in an action for fraud in making shingles, averred that the defendant contracted to make a certain quantity of shingles for the plaintiff. A new count, alleging that by the contract the plaintiff was to furnish materials to the defendant for making the shingles, was held to be for a new cause of action, and therefore not allowable. (*Morton v. Fairbanks*, 11 Pick. 368.) And where the demandant in a writ of entry claimed a fractional part of a messuage, he was not allowed to amend by adding a count demanding the whole. (*Slater v. Nason*, 15 Pick. 345.) But where his count averred that his ancestor was seised within twenty years, and that the tenant disseised the demandant, he was allowed to amend by substituting an averment that the demandant was seised, and that the tenant within thirty years disseised him. (Id. See *Campbell v. Proctor*, 6 Greenl. 12.)

Let us now examine some of the cases where the cause of action has been held not to be different, and amendments have, therefore, been allowed upon the principle of *Penny v. Cleef*, (1 Hall, 165,) that an amendment of the declaration will at all times be granted upon payment of costs, when such amendments do not operate as a surprise upon the defendant nor subject him to injury. Thus where plaintiff declared, that "defendant, administrator, &c. being indebted for money had and received by the intestate, promised," &c., and amended thus, "the intestate being indebted for money had and received by him, promised," &c. Held, the amendment was for the same cause of action as the original count. (*Eaton v. Whitaker*, 6 Pick. 465.) And where in an action by an executor, the original declaration was for money had and received by the defendant to the use of the plaintiff as executor; the

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court allowed plaintiff to amend by adding counts for money had and received by the defendant to the use of the testator, and a promise thereon to pay the executor—on an *insimul computassent* between the plaintiff as executor and the defendant, of money due the plaintiff as executor—and for money had and received to the use of the testator, and a promise to pay the testator. Verdict and judgment for the plaintiff. Held that it was not error to allow the amendments, and that, after verdict and judgment, the amended counts must be presumed to be for the same cause of action as the original count, as nothing appeared on the record to show that they were for different causes. (*Clarke v. Lamb*, 5 Pick. 512. See *Willis v. Crooker*, 1 Pick. 204.) And where the original count was *indeb. assump.* for goods sold and delivered, and a bill of particulars was filed, and afterwards two new counts were added, charging the defendant with having received goods as bailiff or factor, and no evidence was adduced, in support of these counts, of any other goods being received than those contained in the bill of particulars, a verdict on the new counts was sustained—the amendment being only a variation in the form of declaring. (*Ball v. Clafin*, 5 Pick. 303.) So after issue joined, the plaintiff in trover was allowed to amend his declaration, by substituting the words “hyson skin” for “hyson tea,” the substantive cause of action in both cases being the same. (*Henesheff v. Miller*, 2 Johns. R. 295.) So where the declaration is in *indeb. assump.* for goods sold, &c. the plaintiff may be permitted at the trial to add a count on a *quantum meruit*. (*Rodrigue v. Curcier*, 15 S. & R. 83.) And a declaration charging one, who had endorsed a note in blank, as an original promisor, may be amended by charging him as guarantor. (*Tenney v. Prince*, 4 Pick. 385. See 10 Mass. 251.) And where the action was for damages arising from the defendant’s misconduct, as agent in the sale of certain goods consigned to him, it was held that the defendant might add several other counts tending to the same point with the original declaration, and preserving the substance of the same complaint. (*Rodrigue v. Curcier*, 15 S. & R. 81.) Where a declaration charged a postmaster with unlawful neglect and refusal to deliver a letter, a new count was received, charging the same act to have been done by one duly sworn, whom the defendant wrongfully permitted to have the care of the mail in his office. (*Bishop v. Williamson*, 2 Fairf. 495.) So in an action on a policy of insurance, where the plaintiff declared on loss by capture and by perils of the sea, the court permitted an amendment by adding a count for loss by barratry. (*Anon.* 15 S. & R. 83.) And where the plaintiff declared in *assumpsit* for breach of a promise to convey land, it was held that he might amend the declaration by setting forth again the breach of contract, blended with complaints of fraud. (*Cavene v. Michael*, 8 S. & R. 441.) In an action against an administrator, counting on the intestate’s promise, to which the statute of limitations is pleaded, leave was given to amend by adding a count stating a promise by the administrator. (*Saltar v. Saltar*, 1 Halst. 405. *Lindsay v. Jamison*, 4 M’Cord, 93.) In trespass *qu. cl.* plaintiff may amend by alleging any other torts in the same close, only more accurately describing the *locus in quo*. (*Cummings v. Rawson*, 7 Mass. 440.) And in case for a vexatious suit, where the declaration alleged that the defendant maliciously commence-

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ed his action, and attached the plaintiff's property, it was held allowable to amend so as to charge defendant with maliciously continuing his attachment after he knew he had no just cause of action. (*Stone v. Swift*, 4 Pick. 393.) And though a cause has been two years at issue, and twice noticed for trial, the declaration may be amended by adding a new count upon the same cause of action, on the plaintiff's paying only the costs of motion, unless the pleas are withdrawn or a new defence is rendered necessary by the amendment. (*Saltus v. Bayard*, 12 Wend. 228.) It is stated as a general rule, that in actions of slander, new general counts, alleging that the defendant charged the plaintiff with forgery, fraud, lacerney, &c., being for the same causes of action as the original counts, may be filed by way of amendment. (*Gay v. Homer*, 13 Pick. 535. See also *Williams v. Cooper*, 1 Hill, 637.) And where a declaration alleged that the defendant was a pilot for the harbor of B., duly appointed, &c., and that he undertook to pilot the plaintiff's vessel, but that by his negligence, the vessel was lost, a new count was allowed to be filed, alleging the same loss by the defendant's negligence, and also reciting the rules made pursuant to statute, by the B. Marine Society, which were referred to in the defendant's commission, and served to show the nature and extent of his duties as pilot. (*Heridia v. Ayres*, 12 Pick. 334.) In Pennsylvania, it is established that where the foundation and purpose of an agreement is the same as set forth in the original count, and in that which is offered as an amendment, the latter will be received, although there be a difference in the two, both as to the terms and the breaches of the agreement. (*Kester v. Stokes*, 1 Miles, 67. S. P. *Coze v. Tilghman*, 1 Whart. 262.)

Upon the same principle, where in an action for breach of promise of marriage, the declaration contained three counts; the first of which was to marry on request; on a motion to amend by adding a new count, to marry on a particular day, the court of common pleas ordered the first count to be amended by striking out the promise to marry on request, and inserting a particular day, although the declaration had been filed more than two terms; and they directed the costs of such application to abide the event of the cause. (*Horton v. Shilliter*, 6 Moore, 490.) So where in an action by assignees for the rescue of goods distrained for rent due to the bankrupt, the court allowed new counts to be added, stating the facts to have taken place in the time of the provisional assignee, though two terms had elapsed since the return of the writ, the cause of action being substantially the same. (*Freen v. Cooper*, 2 Marsh. 59. 6 Taunt. 358.) So where in an action of slander for giving a servant a false character, a rule for a new trial was made absolute, and the plaintiff had leave to amend one of the counts of the declaration, in order that the words charged might be made to correspond with those proved at the first trial; the court allowed a new count to be added to enable the parties to try the merits at the second trial. (*Wyatt v. Cocks*, 10 Moore, 504.) So the declaration was permitted to be amended by allowing plaintiffs to declare on the same cause of action, as surviving partners instead of administratrixes, when administration was not taken out before action brought, and the statute of limitations would have run against a new action. (*Taylor v. Lyon*, 5 Bing. 333. 2 M. & P. 586.) And in an action for disturbance of a right of ferry, the de-

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claration was allowed to be amended, after the cause had been taken down to the assizes and the record withdrawn, by introducing new counts, in which the termini of the ferry were varied, and also the description of the persons liable to toll. (*Morris v. Evans*, 1 Dowl. P. C. 657.) So in an action against the sheriff for taking insufficient pledges in a replevin bond, the court allowed the declaration, which was in the common form, to be amended (upon payment of costs,) by alleging, instead of a recovery in the original action, a reference by the consent of the sureties and the defendant, and the result of that reference; and also by adding a new count. (*Dale v. Gordon*, 3 M. & Scott, 339.) And in an action by executors, the defendant pleaded in abatement the nonjoinder of one executor, (who had not proved.) The court allowed the proceedings to be amended, on payment of costs, as the statute of limitations would have been a bar to a fresh action. (*Lakin v. Watson*, 2 Dowl. P. C. 633.) And in debt on a recognizance of bail, the declaration stated the recognizance to have been entered into in an action of debt against J. S. On the production of the record, (on a plea of *nul tiel record*,) it appeared that the original action was on promises. The court allowed the declaration to be amended on payment of costs, but required a special application for that purpose, and would not permit it to be made to prevent the defendant from obtaining judgment. (*Munkenbeck v. Bushnell*, 4 Dowl. P. C. 139. See also *Ernest v. Brown*, 2 M. & Rob. 13.) An amendment of the plaintiff's declaration does not necessarily entitle the defendant to plead *de novo*, but only where the amendment alters the state of the defendant's case. (*Woodroffe v. Watson*, 6 Taunt. 400.)

Change of venue.] The court will not amend a declaration, by changing the venue, unless the plaintiff shows substantial ground for it; therefore, where the plaintiff moved to amend, by changing the venue from Bedford to Middlesex, on the ground that the action depended on the construction of an act of parliament, the court, on the affidavit of the defendant that the cause of action arose in Bedfordshire, discharged the rule. (*Ayres v. Buxton*, 2 Marsh. 121. 6 Taunt. 408.) And where a plaintiff, an attorney, by the mistake of his agent, laid the venue in the country, instead of Middlesex, the court refused to amend by changing it to Middlesex. (*Lewis v. Shelley*, 2 Marsh. 426. 7 Taunt. 146.) But (in Massachusetts) where in assumpsit on a promissory note, the declaration described it as dated at Concord in the county of Middlesex, whereas on the trial it appeared to be dated at Boston in the county of Suffolk, the court held, that although the correct mode of declaring upon a promissory note bearing date of a place not within the county, is to set out the true date and lay the venue under a *videlicet*, yet that the plaintiff might amend without costs. (Sembles, *Munroe v. Cooper*, 5 Pick. 412.) In *Farrington v. Suydam*, (9 Wend. 430,) the plaintiff, after having noticed his cause for trial, was permitted to amend his declaration by changing the venue, on paying the costs of resisting the motion, and of the former plea, if a new defence was interposed. And in *Wakeman v. Sprague*, (7 Cowen, 164,) the court held, under the 8th rule of April term, 1796, that in a case where the plaintiff might amend of course, he might so amend as to

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change the venue. (See also *Den v. Averill*, Coxe, 583. *Paine v. Parker*, 13 Johns. R. 329.)

Change of the name or character of the party.] Where the name of the plaintiff was mistaken in the process and all the proceedings, the court of exchequer allowed the amendment of the declaration whilst every thing was on paper. (*Gardner v. Walker*, 3 Anst. 935.) So a variance between the name of the attorney in the warrant and in the declaration may be amended by altering the name in the warrant to that in the declaration, in a penal action, after error brought and the variance assigned for error. (*Richards q. t. v. Brown*, 1 Dougl. 114.) And in an action by the assignees of a bankrupt, the court allowed the declaration to be amended by adding the name of the official assignee as a plaintiff, on payment of costs. (*Baker v. Neaver*, 1 C. & M. 112. 1 Dowl. P. C. 616.) So where in a declaration in slander, the charge was that the defendant alleged of the plaintiff that "she ran away from Fairfield for *stealing*," and the defendant's christian name was misstated in the declaration, it was held that it might be amended by the writ in which it was correctly stated. (*Phillips v. M'Masters*, 2 Rep. Conn. Ct. 261.) In *indeb. assump.* against a factor to recover the amount of sales under a *del credere* commission, the original counts were for balance of account, money had and received, and on an *insimul comput.* Plaintiff was permitted to amend, by declaring against defendant as a simple factor, and also as a factor with a *del credere* commission. (*Swan v. Nesmith*, 7 Pick. 220. *S. P. Caldwell v. Remington*, 2 Whart. 132. *Yoke v. Robertson*, 2 Whart. 155.) So where the writ stated the defendant's testator, as bailiff and receiver of A., and the declaration charged him accordingly, an amendment was permitted by adding a count, in which the plaintiff was described as surviving partner, and his interest as having been held jointly with a certain B., deceased. (*Grutz v. Philips*, 1 Binn. 588.) And in an action for a legacy against one charged, by mistake, as executor, the plaintiff may amend by charging him as devisee. (*Leighton v. Leighton*, 1 Mass. 433.) Upon the same principle, an averment that a minor sues by guardian may be amended by changing it so as to aver a suing by next friend. (*Slater v. Nason*, 15 Pick. 345.)

But it is error to allow a plaintiff to amend by adding a new party. (*Chamberlin v. Hite*, 5 Watts, 373. See also *Shute v. Davis*, 2 Johns. Cas. 236.)

Change of the thing demanded.] An amendment is not allowable in the description of the thing demanded. (*Carter v. Branch*, 1 Hayw. 135.) And the court refused to grant leave to amend a declaration in trover, after the jury was sworn, by inserting other articles. (*Keesby v. Donaldson*, 2 Browne, 103.)

§ 4. *At what time the declaration may be amended.*

Amendment before pleas.] See 8th rule of the Supreme Court of New York of April term, 1796, and rules 23 and 24 of 1845, and 22 and 23 of 1847, which are similar.

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After plea or demurrer.] Declarations may be amended after plea or demurrer. (*Lanning v. Shute*, 2 South. 778. See *Holbrook v. Pratt*, 1 Mass. 96. *Hallock v. Robinson*, 2 Caines, 133. *Hobby v. Mead*, 1 Day, 206. *Austin v. Dills*, 1 Tyler, 311. *Gammon v. Schmoll*, 5 Taunt. 344. 1 Marsh. 80. *Lakin v. Watson*, 2 Dowl. P. C. 633. *Shute v. Davis*, 2 Johns. Cas. 236.) So after withdrawing a demurrer to a plea, the plaintiff may amend his declaration by adding a new count. (*Harris v. Wadsworth*, 3 Johns. 257.) As we have before seen, a plaintiff, in New York, may amend his declaration at any time within 20 days after service of the plea, if the plea be the general issue; (*Hitchcock v. Post*, 1 Wend. 16;) therefore, where otherwise the action would be barred by the statute of limitations, a declaration in slander may be amended, even after issue joined. (*Tobias v. Harland*, 1 Wend. 93.) But the plaintiff cannot amend his declaration, after plea pleaded, without paying costs and giving an imparlance. (*Holmes v. Lansing*, 1 Johns. Cas. 248. *Coleman*, 92. See also *Farnum v. Bell*, 3 New Hampshire, 72. *Goodwin v. Smith*, 4 id. 29. *Baker v. Harrison*, 5 Little, 60.)

After notice of trial.] The declaration or plea may be amended at any time previous to the trial, provided the opposite party is not taken by surprise; (*Golders v. Clayton*, 1 Browne, 175; *Penny v. Van Cleef*, 1 Hall, 165;) therefore, a plaintiff, after notice of trial, may be allowed to amend his declaration by changing the venue, on paying costs of motion, and of former plea, if a new defence be interposed. (*Farrington v. Suydam*, 9 Wend. 430.) And a declaration was amended by altering the time of demise, though the cause had been twice noticed for trial, and on objection taken on the trial, that the time was laid too early, and a bill of exceptions signed on this point. (*Jackson v. Tuttle*, 6 Cow. 590. S. P. *Lion v. Burtis*, 18 Johns. 510.) And it has been held that a second count in slander may be amended even after issue joined, by inserting the word "other" before the word "discourse;" the first count having alleged a certain discourse. (*Gay v. Homer*, 13 Pick. 535.) But the same strictness is required, as to amendments, whether they are applied for before or at the time of trial. (*Ib.*) And inasmuch as an amendment of a declaration shall not delay the defendant, (*Republics v. Coates*, 1 Yeates, 35,) an amendment of a declaration was refused when it was too late for the defendant to have an imparlance. (*Proprietary v. Pearce*, 1 Har. & M'Hen. 223. See also *Noble v. King*, 1 H. Black. 34.)

In Pennsylvania the rule with regard to amendments is exceedingly liberal. The statute of that state fixes no limit to the number of amendments, and a plaintiff, after amending his declaration twice, may amend it a third time on trial; (*Franklin v. Mackey*, 16 S. & R. 117;) and provided the opposite party is not taken by surprise, the declaration or plea may be amended at any time during the trial, without costs. (*Clark v. Herring*, 5 Bin. 33. *Miles v. O'Hara*, 1 S. & R. 32. *Cunningham v. Day*, 2 S. & R. 1. *Smith v. Rutherford*, id. 358.) Therefore, where the declaration is in *indeb. assump.* for goods sold, &c., the plaintiff may be permitted at the trial to add a count on a *quantum meruit*. (*Rodrigue v. Curcier*, 15 S. & R. 83.) So in an action on a policy of insurance, where the plaintiff declared on loss by capture and by perils of the sea, the court

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permitted an amendment by adding a count for loss by barratry. (*Anon.* 15 S. & R. 83.) So where plaintiff has been allowed, without objection, to give evidence, which might have been objected to in the state of the pleadings, he may amend his declaration, after the evidence on both sides is closed, and the argument begun, so as to make it correspond with such evidence. (*Christine v. Whitehill*, 15 S. & R. 198.) So in trespass, where the declaration stated the act to have been committed in the township of Beaver, in Union county, the plaintiff was allowed to amend the declaration, after the jury was sworn, by inserting the name of Centre township, instead of Beaver, to correspond with the fact. (*Clymer v. Thomas*, 7 S. & R. 178.) So where, in debt on a recognizance, the writ describes the defendant as a joint and several cognizor, the declaration may be amended, so as to make it a several recognizance. (*Franklin v. Mackey*, 16 S. & R. 117.) So a declaration in ejectment was altered after the jury was sworn, to make it conformable to the record. (*Lessee of Smith v. Brown*, 1 Yeates, 513.) So in an action on a sheriff's bond, the plaintiff may assign new breaches of the condition of the bond, after the jury is sworn. (*Shannon v. Commonwealth*, 8 S. & R. 444.)

In Vermont it has been held that in declaration on a libel *quæ sequitur in his verbis*, where the minutest variance is fatal, an amendment will be ordered *instante*, if exception is taken on the trial, without paying costs; (*Harris v. Lawrence*, 1 Tyler, 156;) and in Virginia, that on trial of the issue of *nul tiel* record, the court may allow an amendment of the declaration. (*Anderson v. Dudley*, 5 Call, 529. See also *Tabb v. Gregory*, 4 Call, 225.)

But in Pennsylvania, the court refused to grant leave to amend a declaration in trover, after the jury was sworn, by inserting other articles; (*Keasby v. Donaldson*, 2 Browne, 103;) and in one case, the district court refused to allow a declaration to be amended, by striking out the word *indorser* and inserting *indorsee*. (*Thackara v. Curren*, 2 Browne, 246.) So in slander, where the words were not actionable in themselves, but were laid as having been spoken of a man's trade or calling, the court refused to allow the declaration to be amended after the jury was sworn, by altering the trade laid in the declaration, (*Id.*) though this was doubted by the supreme court. (15 S. & R. 83.) So where the declaration is in itself formal, the court will not, at the moment of trial, allow a new and substantial count to be added, changing the nature of the controversy. (*Howard v. M'Kown*, 2 Browne, 150, 159.)

After the trial or verdict.] The declaration may be amended after a trial, and a juror withdrawn; (*Jude v. Syme*, 3 Call, 522;) and the court of exchequer allowed a plaintiff to amend his declaration, after a new trial obtained, on the ground of a variance, upon the usual terms of paying the costs of the amendment and application only; the costs of the new trial to abide the event. (*Hooper v. Mantel*, 13 Price, 695, 736; M'Clel. 388.) And it was held that a declaration may be amended after a nonsuit, where a fresh action would otherwise be barred by the statute of limitations. (*Dartnall v. Howard*, 2 Chit. 28.) But, generally, the court will not allow the plaintiff to amend, even on payment of the costs of the trial, but will leave him to his

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remedy, by bringing a fresh action. (*Brown v. Knill*, 5 Moore, 164 ; 2 B. & B. 395.) Where a declaration contained a profert of a bond, from which the seal had been torn, and trial was had on *non est factum* pleaded, and the point was reserved, the plaintiff was allowed, before arguing the point reserved, to amend, by adapting his declaration to the fact ; the defendant not having been misled by the original form of declaring. (*Rees v. Overbaugh*, 4 Cow. 124.) So of a lost deed. (*Jansen v. Ball*, 6 Cow. 628.) So where one of the counts in the declaration was good, and the others bad, (the defendant having moved in arrest of judgment,) the plaintiff was allowed to amend the bad counts, on payment of costs since declaring. (*Livingston v. Rogers*, 1 Caines, 583.) And a declaration was permitted to be amended by adding a count setting forth a special agreement, nine years after the commencement of the suit, and after three trials had at the circuit ; the agreement having been proved at each trial, without objection to the declaration, and the statute of limitations having run so as to bar a new action ; (*Miller v. Watson*, 6 Wend. 506 ;) and an amendment as to the place laid in a declaration in ejectment, granted after the plaintiff had been nonsuited at the trial, for variance ; (*Jackson v. Bailey*, 5 Cow. 265 ;) and where a plaintiff suffered a nonsuit from a mistake in his declaration, the court afterwards permitted him to take off the nonsuit and amend the declaration, on paying costs ; (*Craig v. Brown*, Peters C. C. 139 ; *Hill v. Haskins*, 8 Pick. 83 ;) and the time of the demise may be amended after nonsuit, on the ground that the lessor of the plaintiff was a *feme covert* at the time of the demise ; (*Denz. Franklin*, 2 South. 850 ;) and in Pennsylvania it has been held that a declaration, setting forth that defendant bound himself not to do a certain act, where he evidently intended to bind himself to do it, being amendable in the court below, will be held in the court above as actually amended. (*Cummings v. Lebo*, 2 Rawle, 23.)

Generally, a declaration cannot be amended after verdict. (*Marriott v. Lister*, 2 Wils. 141, 147. And see *Lloyd v. Skutt*, 2 Tidd's Prac. 776 ; *Watson v. Richardson*, 1 Wils. 226.) But an amendment may be made by increasing the damages according to the truth of the case as found by the jury, the former verdict being at the same time set aside, and a new trial granted, to enable the defendant to make his defence to the demand so enlarged. (*Tomlinson v. Blacksmith*, 7 T. R. 132.) In New York a declaration may be amended on terms, after verdict, so as to conform it to the proof. (*Hull v. Turner*, 1 Wend. 72.) Thus a declaration in trover for notes, misdescribing them, was amended after verdict, and a case made, upon which the variance was presented as one objection. (*Hoffnagle v. Leavitt*, 7 Cow. 517. S. P. *Stanwood v. Scovel*, 4 Pick. 422.) But the defendant's reliance on the variance having caused a material want of preparation for defence on the merits, the motion for amendment was accompanied with the condition that the plaintiff should consent to a new trial ; otherwise, that the case should proceed to argument with the variance upon it. (7 Cow. *ubi sup.*) And in Massachusetts, the declaration may be amended after judgment is arrested for a defect in the original declaration ; a new trial being granted. (*Williams v. Hingham Turnpike*, 4 Pick. 341. S. P. *Wilson v. Bowen*, 5

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Monr. 35. See also *Jude v. Syme*, 3 Call, 552.) So in Pennsylvania a declaration in assumpsit, laying the promise to have been made after the action was commenced, may be amended after verdict, by altering the day upon which the promise was laid, if it appears from the record that the cause of action arose before the commencement of the suit. (*Bailey v. Musgrave*, 2 S. & R. 219.) But where a verdict is found for an amount exceeding the damages claimed in the declaration, the plaintiff will not be permitted to amend his declaration by increasing the damages, unless he abandons his verdict, pays the defendant's costs of the trial and of resisting the motion, and consents to a new trial. (*Dox v. Dey*, 3 Wend. 356.) Therefore, in slander, where the *ad damnum* was \$1000, and the verdict \$4250, the court refused to allow the declaration to be amended by increasing the amount of damages alleged. (*Curtis v. Lawrence*, 17 Johns. 111.) And in Pennsylvania, where damages found by a jury exceed the amount laid in the declaration, the court will not amend the declaration without sending the cause to a new trial. (*Girard v. Stiles*, 4 Yeates, 1.) And it has been there laid down as a general principle, that after verdict, no new count can be added, nor can the form of the declaration be essentially varied. (*Mayfield v. White*, 1 Browne, 250.) So in New Hampshire, the want of a material allegation in a declaration cannot be supplied by way of amendment, after a verdict. (*Freeze v. Marston*, 5 New Hamp. 221.)

After the judgment.] Where, on a judgment by default, on a declaration upon a promissory note with the money counts, the plaintiff had caused the damages to be assessed by the clerk, and taken final judgment without entering a *nolle prosequi* as to the money counts; on a motion to set aside the judgment and subsequent proceedings, he was allowed to amend, on payment of costs, by entering a *nolle prosequi*; and the motion to set aside the judgment was denied. (*Seeber v. Yates*, 6 Cow. 40.) So where a plaintiff, on leave to amend, struck out a count, erroneously supposing he had a better remedy for the cause of action on which it was founded, and took judgment on the remaining counts, he was permitted, on a review of the first action, to restore that count, having first unsuccessfully attempted his other supposed remedy. (*Parker v. Parker*, 17 Mass. 376.) So in Pennsylvania, an omission to strike out the name of the casual ejector, and to insert that of the real defendant, may be amended after judgment. (*Bailey v. Fairplay*, 6 Binn. 450.) And on a second trial, after reversal of a former judgment. (*Lee v. Wright*, 1 Rawle, 149.) So in New Jersey an amendment of a declaration was allowed after judgment by default, on the condition of opening the judgment, and giving time to plead. (*Boudinot v. Lewis*, 2 Pen. 512. See also *De Lisle v. Priestman*, 1 Browne, 115.)

§ 5. *Effect of amendment upon the rights of the opposite party.*

In allowing amendments of pleadings, as we have before seen, the rights of the opposite party are carefully guarded by the courts, and no amendment permitted which will do him injustice. Therefore, an amendment of a declaration shall not delay the defendant. (*Respublica v. Coates*, 1 Yeates, 35.)

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And again: if a declaration be so amended as to operate as a *surprise* upon the defendant, a continuance will be granted. In Indiana, this right is given by statute where the plaintiff makes a substantial amendment. Under this statute, it is held that inserting, in a declaration in covenant, an averment that the instrument declared on is under seal, is a substantial amendment. (*Kelly v. Duignan*, 2 Blackf. 490.) And so of the insertion of an averment of a demand made on the defendant, in a case where a demand was necessary before the action could be brought. (*Ewing v. French*, 1 Blackf. 170.) But a continuance shall not be claimed for any amendment, unless the adverse party is thereby surprised; of which, in general, the court is to judge. (*Folker v. Scatterlee*, 2 Rawle, 213.) And in Maryland, an imparlance was refused on an amendment of a declaration made at the last term to which the cause could be legally continued. (*Dashiel v. Heron*, 1 Har. & M'Hen. 385. See also *Anderson v. Dudley*, 5 Call, 529. *Furniss v. Ellis*, 2 Brock. 14.)

In *Anon.* (2 Salk. 517,) Holt, Ch. J. said, "anciently they did not plead *de novo* after an amendment. The practice of pleading *de novo* is but of late introduced, but with great reason." (See also *Berry v. Rodney*, 2 Chit. R. 332. *Blunt v. Morris*, 2 Bl. R. 785. *Barton v. Moore*, 8 T. R. 87.) This rule prevailed when the courts were far more strict and technical in allowing amendments than they have been for a great many years, and it is now necessarily changed by the liberal extension of the power and practice of amendment. The English practice allows a new plea in all cases, the amended declaration being considered equivalent to a new one, and all subsequent pleadings as in effect stricken out. (Tidd, 469, 474, 707.) In *Woodruffe v. Watson*, 6 Taunt. 406,) it was decided that an amendment of the plaintiff's declaration does not necessarily entitle the defendant to plead *de novo*, but only where the amendment alters the state of the defendant's case; and in *Huckvale et al. v. Kendal*, (3 Barn. & Ald. 137,) it was decided that after delivery of an amended declaration, a demand of a plea is not necessary to entitle a party to sign judgment. In *Flogg v. Borsley*, (1 C. & M. 770; 3 Tyr. 905; 2 Dowl. P. C. 107,) it was held that where a plaintiff amends his declaration with liberty to the defendant to plead *de novo*; if the defendant do not plead *de novo*, the former plea will stand, if it be applicable to the amended declaration. In Virginia, where on trial of the issue *nul tiel record*, the court allows an amendment of the declaration as it may do, (see *Anderson v. Dudley*, 5 Call, 529; also, *Tabb v. Gregory*, 4 id. 225,) the defendant is allowed to amend his plea, or plead anew, or is entitled to a continuance, if he asks it. (*Anderson v. Dudley*, *ut supra*. See also *Furniss v. Ellis*, 2 Brock. 14.) And in New York where one party is permitted to amend, or amends without leave, the other has a right to plead *de novo*, whether the new plea be material to his defence or not. (*Penny v. Van Cleef*, 1 Hall, 165. See also *Crosby v. Hite*, 1 Wash. 363.) But though one party obtain leave by special motion to amend his pleading in matter of substance after issue joined thereon, the opposite party is not allowed to answer the amended pleading *de novo*, unless the right be expressly reserved in the rule. Though it is otherwise where the amendment is of course pursuant to the 23d rule of

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the supreme court of that state. (*Barstow v. Randall et al.* 5 Hill, 556.) As we have seen before, the statute of New York, (2 R. S. 2d ed. 343,) provides that if any pleading is amended in matter of substance, the adverse party shall be allowed to answer. In England where an amendment of the declaration is allowed, no new rule to plead shall be deemed necessary, whether such amendment be made of the same term, or of a different term (Reg. Gen. K. B., C. P., and Excheq., H. T. 2 W. 4, 1 Dowl. P. C. 188; 8 Bing. 294; 1 M. & Scott, 420; 3 B. & Adol. 379; 2 C. & J. 179; 2 Tyr. 344; 4 Bligh, N. S. 597.)

As to the practice and costs in amendment, the reader is respectfully referred to the various books of practice, in which the subject is fully treated, and to the United States Digest, (tit. Amendment,) where a large number of valuable cases have been collected upon the law of amendment, for which the editor is grateful, in common with the rest of the profession throughout the country.

PARKER *against* TOMLINSON.

If the principal be surrendered, pending the suit by *scire facias*, against the bail, an *exoneretur* will not be allowed, until the costs of the proceedings against bail are paid.

THIS was an action of *scire facias*, on recognizance against bail. Pending the *sci. fa.* and before the plea, the principal surrendered, within the time allowed, and the question was, whether the *exoneretur* was to be entered with, or without payment of costs.

Per Curiam. The proceedings stay *ex gratia*; and it is reasonable that the costs should be paid before the bail are exonerated.(a)

(a) See Grah. Pr. 2d ed. 822. 2 R. S. 613, § 3.

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[*221] *HILDRITH *against* HARVEY.

A rule regularly obtained, in absence of the counsel for the other party, will not be vacated at a subsequent term.

EMOTT, for the plaintiff, moved to vacate a rule, which had been taken, as of course, at the last term, to set aside a judgment by default in the cause. He stated that he attended in court faithfully during the term; though he happened to be absent when the defendant obtained the rule.

Van Vechten, contra.

Per Curiam. The rule having been regularly obtained by the defendant, without any fraud on his part, we cannot now set it aside, on the ground of the absence of counsel, whose duty it is to be steadily in court, during the term, without establishing a precedent that may be very inconvenient, and which may destroy a settled rule of practice. The *equity* between the parties is now equal. The plaintiff regularly obtained a judgment by default. The defendant has regularly obtained a discharge of that judgment. As the money has been levied on the judgment, and is now in the hands of the plaintiff, we will not order him to pay it back to the defendant; but it must be brought into court to abide the final event of the suit.

Motion denied.(a)

[*222] *LEWIS *against* ELMENDORF.

A member of congress is privileged from arrest only while *at congress*, or *actually going to*, or returning from congress.

VAN VECHTEN, in behalf of the defendant, moved for his discharge from the arrest in this cause. The defendant is a

(a) Grah. Prac. 2d ed. 682.

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member of congress, and was arrested, while travelling, about ten days after he had left home.

Van Vechten contended, that the defendant was allowed twenty miles a day for travelling.

Bowman, contra.

Per Curiam. The privilege claimed by the defendant, is founded on the constitution of the United States. There is no statute on the subject. The act of congress, granting a compensation to members during their going or returning, allowing twenty miles travel to a day, does not apply to the question of privilege. This privilege is to be taken strictly, and is to be allowed only while the party is attending congress, or is actually on his journey, going or returning from the seat of government. The case of *Colvin v. Morgan*, (1 Johns. Cas. 415, and notes,) is in point. The motion is denied.

Motion denied.(a)

(a) By the constitution of the United States, (art. 1, § 6,) senators and representatives in congress are privileged from arrest in all cases, except treason, felony, and breach of the peace, during their attendance at the session of their respective houses, and in going to and returning from the same. This privilege ("indispensable for the just exercise of the legislative power in every nation,") has always been enjoyed by both houses of the British parliament, and by all the legislative bodies which exist, or have existed, in America. (2 Story's Comm. on the Const. 325, § 856. 1 Black. Comm. 164, 165. Com. Dig. Parliament, D. 17. Jefferson's Manual, § 3, Privilege. *Benyon v. Evelyn*, Sir O. Bridg. R. 334. 1 Kent Comm. p. 221. *Bolton v. Martin*, 1 Dall. R. 296. *Coffin v. Coffin*, 4 Mass. R. 1.)

This privilege is a shield against all process, such as a *subpoena ad respondendum* and *testificandum* or a summons to serve on a jury, the disobedience to which is punishable by attachment of the person. The reason is well stated by Justice Story, (2 Comm. on Const. p. 325, § 857.) "When a representative is withdrawn from his seat by a summons, the people, whom he represents, lose their voice in debate and vote, as they do in his voluntary absence. When a senator is withdrawn by summons, his state loses half its voice in debate and vote, as it does in his voluntary absence. The enormous disparity of the evil admits of no comparison. The privilege, indeed, is deemed not merely the privilege of the member, or his constituents, but the privilege of the house also. And every man must at his peril take notice, who are the members of the house returned of record." This privilege has been stated to be co-extensive with that of witnesses, suitors and jurors, (*United States v. Cooper*, 4 Dall. 341; *King v. Coil*, 4 Day, 133; *Gibbs v. Mitchell*, 2 Bay,

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[*223] *JACKSON *ex dem.* SOUTHAMPTON, ANN, his Wife,
and others, *against* COOLY.

Evidence of an agreement for a lease between the lessor in ejectment, and the person in possession, is not sufficient to enable the plaintiff to recover the possession, when there is no proof that any lease was ever executed, or rent paid, and the tenant claimed to hold adversely.

THIS was an action of ejectment. The cause was tried at the Montgomery circuit, in June, 1800, before Mr. Justice Radcliff. A verdict was taken for the plaintiffs, subject to the opinion of the court, on the following case.

406 ; see also 1 Graham's Prac. 3d ed. 511, 512,) which embraces a reasonable time, *eundo, morando et redeundo*, instead of being limited by any precise time. (*Harris v. Grantham*, Coxe, 142. *Blight v. Fisher*, Peters' C. C. 41. *Commonwealth v. Ronald*, 4 Call, 97. *Richards v. Goodson*, 2 Virg. Cas. 381. *Hurst's case*, 4 Dall. 387. 4 Yeates, 124, note. 1 Wash. C. C. 186. *M'-Neil's case*, 6 Mass. R. 245, 264. *Meekins v. Smith*, 1 H. Black. 636. *Walpole v. Alexander*, 3 Doug. 45. *Anon. Lofft*, 34. See the New York cases, 1 Grah. Pr. 3d ed. 515, 516.) The effect of this privilege is, that the arrest of the member is unlawful, and a trespass *ab initio*, for which he may maintain an action, or proceed against the aggressor by way of indictment. He may also be discharged by motion to a court of justice, or upon a writ of habeas corpus ; (Jefferson's Manual, § 3 ; 2 Str. 990 ; 2 Wilson's R. 151 ; Cas. Temp. Hard. 28 ;) and the arrest may also be punished, as a contempt of the house. (1 Black. Comm. 164, 165, 166. Com. Dig. Parliament, D. 17. Jefferson's Manual, § 3.) In respect to the time of going and returning, the law is not so strict in point of time, as to require the party to set out immediately on his return ; but allows him time to settle his private affairs, and to prepare for his journey. Nor does it nicely scan his road, nor is his protection forfeited, by a little deviation from that which is most direct ; for it is supposed that some superior convenience or necessity directed it. (Jefferson's Manual, § 3. 2 Str. 986, 987.) The privilege from arrest takes place by force of the election, and before the member has taken his seat, or is sworn. (Jefferson's Manual, § 3 ; but see Com. Dig. Parliament, D. 17. 2 Story's Com. on Const. 327, §§ 860, 861.) Where a member of congress, who had been surrendered by his bail, claimed to be discharged on the ground of privilege, and the counsel for the bail proposed to remain responsible for surrendering him within four days after the session of congress, which the counsel for the plaintiff agreed to, the court declared their approbation of the compromise, as affording a good precedent for future cases of a similar kind. (*Coxe v. M'-Clenachan*, 3 Dall. 478.)

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The heirs of Sir Peter Warren, were three daughters, to wit, Ann, married to Lord Southampton, the lessors, Charlotte, married to Lord Abingdon, and Susanna, married to General Skinner. All the heirs resided in Great Britain during the American war. General Skinner and his wife both died subsequent to the year 1775, and during the war, leaving an only child, a daughter, since married to Lord Gage.

A witness for the plaintiff testified, that the defendant was in possession of the premises in 1763, and in 1767, agreed with the witness, as agent for the heirs of Sir Peter Warren, to take a lease of the premises in question from the heirs, for twenty-five years, at the annual rent of one shilling per acre; but the witness did not know that any lease had ever been executed, or any rent paid.

The defendant denied the title of the lessors, and produced in evidence an exemplification of letters patent for the premises in question, dated the 29th August, 1735, by which they were granted to Charles Williams and six others, and their heirs and assigns for ever, in free and common *socage*. He insisted also, that if the heirs of Sir Peter Warren ever had any title to the premises, it had been forfeited by their *alienism*.(a)

Van Vechten, for the plaintiffs.

Cady, for the defendant.

**Per Curiam.* The plaintiff has not proved any [*224] seisin or title in the lessors, or those under whom he claims; and the defendant has shown a title out of the lessors. The evidence about the agreement for a lease, which appears never to have been carried into effect, is not sufficient to give the plaintiff the possession. It does not appear that the defendant was put into possession by the lessors, or that he ever paid them any rent. The defendant must have judgment.

Judgment for the defendant.(b)

(a) See *Kelly v. Harrison*, *supra*, p. 29; n. (a.) p. 32.

(b) See Cowen & Hill's notes to 1 Phill. Ev. 201, 202.

Lawrence v. Bowne.

FORBES *against* FRARY and another.

If referees in a cause, unreasonably refuse an adjournment, requested by a party, to enable him to produce witnesses, the report will be set aside.

WOOD, for the plaintiff, moved to set aside the report of the referees in this cause. From the affidavits, it appeared, that the cause was referred, at the instance of the defendants, who agreed to admit certain *items* in the plaintiff's account, which, at the hearing before the referees, they refused to admit. The plaintiff's attorney then requested an adjournment until the next day, in order that he might produce witnesses to prove the *items*. The referees refused to adjourn, and made up their report, without further proof, by which they found a less sum for the plaintiff, than he claims to be due to him.

Bogert, contra.

Per Curiam. The referees have a reasonable discretion as to adjournments, and they ought to have given a day to the plaintiff to produce his witnesses, as he appears [*225] to have been taken by surprise, though the court *cannot take notice of a mere verbal agreement. The referees, in the exercise of their discretion, acted unreasonably in refusing the adjournment. The report must be set aside.

Rule granted.(a)

LAWRENCE *against* BOWNE.

Where an action was commenced before the debt was due, and an inquest was taken by default, the court refused to set aside the verdict, as the defendant admitted the debt to be due, at the time of making the application to set aside the verdict.

WOODS, for the defendant, moved to set aside the verdict in this cause. At the last circuit in New York, an inquest

(a) See *Grav. Prac.* 2d ed. 573.

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was taken by default, in the absence of the defendant's attorney. The plaintiff, by his affidavit, stated that the debt was not due when the suit was commenced ; though it was *now* due.

B. Livingston, contra.

Per Curiam. This application is too late. There would be no use in setting aside the verdict, when the defendant admits the debt to be due. There is not an affidavit of a defence on the merits. The case of *Crygier v. Lang*, (1 Johns. Cas. 393,) is in point.

Rule refused.

 *THOMAS *against* DOUGLASS.

[*226]

Where a judge's order was obtained to enlarge the time for pleading until the second day of the term, the defendant had until the next day to plead, and a default entered on the second day was irregular.

After a rule to change the *venue*, the plaintiff entered a default for want of a plea, without altering the declaration filed, or filing a new declaration and delivering a copy ; and it was held irregular.

GRAHAM, for the defendant, moved to set aside the default and judgment entered in this cause, on the ground of irregularity.

The defendant had obtained a judge's order, enlarging the time to plead, until the *second* day of the last term ; on which day the default for not pleading was entered. A rule for changing the *venue* was also obtained on the second day.

Woodworth, contra.

Per Curiam. The defendant had time to plead until the second day of the term, and the order must be construed as including that day ; so that the default could no be entered on that day.(a) Again, the *venue* was changed, and notice thereof given before the time for pleading had expired. It

(a) 1 Grah. Prac. 2d ed. 619 ; *Donne v. Marsh*, 7 Taunt. 587 ; 1 Moore. 320.

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was then incumbent on the plaintiff to alter the declaration on file, and the copy delivered accordingly, or file and deliver a new declaration. This not having been done, the judgment is, on this ground also, irregular, and must be set aside.(b)

Rule granted.

(b) See Grah. Prac. 2d ed. 787, 788.

END OF JANUARY TERM.

CASES
ADJUDGED IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW YORK,
IN APRIL TERM, IN THE YEAR 1801.

[During the last vacation, Mr. Justice BENSON, having been appointed a judge of the circuit court of the United States, resigned his seat in this court.]

WADDINGTON and others *against* VREDENBERGH.

An *audita querela, quia timet*, cannot be sued out by a purchaser of land, until after execution has been issued.

The writ must be allowed in open court, but is not itself a *supersedeas*; and where the party is not in actual custody, or sues *quia timet*, a *venire facias* is the proper process.

A. and B. partners, in trade, having dissolved their partnership, B. took the property, and engaged to pay off all the debts due by the partnership, among which was a judgment against A and B. at the suit of C. B. having become insolvent, C. threatened to take out execution against A., who paid the amount of the judgment, and C. agreed that A. might have the benefit of the judgment, to recover the amount, out of the property of B. in the name of C. A. sued out execution against the land of B., which was bound by the judgment; B. assigned all his property to D. and others, for the benefit of his creditors, and it was held that A. was to be considered merely as a surety of B., and entitled to an equitable lien on the property of B., and that D. and others, to whom it was assigned, took it, subject to such equitable lien; and the court could not, therefore, relieve them by an *audita querela*.

THE defendant obtained a judgment against White and Stout, on a policy of insurance, subscribed by them as partners. They became partners, as insurers, on the 29th February, 1796, and the partnership was dissolved on the 9th December following. White assumed all the *business, profits, and responsibilities, and agreed [*229]

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to pay Stout 1500 dollars for his share of the profits, and indemnify him against all debts due by the partnership, among which was the loss for which the defendant brought his action and recovered judgment. The suit was against both, and White entered an appearance for himself and Stout, but the latter knew nothing of the suit. After the judgment was obtained, White gave his promissory note to the defendant, for the amount, payable in thirty days; but before the expiration of that time, he failed, and assigned all his property (including land, which was bound by the judgment) to the present plaintiffs, for the benefit of all his creditors. The defendant then demanded payment of Stout, and was about to issue execution against him on the judgment, when Stout paid him the amount, under an agreement that he (Stout) should have the benefit of the judgment, and might use the name of the defendant to recover the money out of the property of White. An execution was then issued on the judgment, directed to the sheriff of Onondaga county, for the benefit of Stout. The plaintiff then filed a bill in chancery, for a discovery, against the defendant and Stout, and also against D. and G. Ludlow, to whom the defendant was indebted, and to whom the note, above mentioned, was assigned by White, before his failure, together with the policy of insurance, on which the judgment was obtained, as collateral security. On this bill an injunction was obtained, by which the execution was stayed. The defendants in chancery having answered, the bill was dismissed, as to D. and G. Ludlow, but the bill and injunction were retained, as to the other defendants, for six months, to give the plaintiffs an opportunity to proceed at law. The six months having expired, without any proceedings at law, on the part of the plaintiffs, an execution was issued on the judgment, returnable at the last January term.

[*229] *The plaintiffs sued out an *audita querela*, and a motion was now made for its allowance, for a *venire facias* to bring in the defendant, and for a *supersedeas* to the execution.

Harison, for the plaintiffs.

Pendleton, contra.

RADCLIFF, J. delivered the opinion of the court. 1. A feoffee, or purchaser of lands subject to a judgment, cannot have an *audita querela, quia timet*, but is entitled to sue out this writ, only *after execution* issued. So a feoffee, or purchaser of *part* of the land, cannot have it till after execution against him, although the execution be issued against the residue of the lands of the original debtor. (3 Viner, 321, B. pl. 1, 2, 3, 4.) Hence the assignees, in the present case, viewed in the light of purchasers, if they were entitled to this writ, could not bring it till after the expiration of six months, to which time the injunction was extended, and till after the execution issued. They are not, therefore, too late.(a)

2. The writ must be allowed in open court, and is not of itself a *supersedeas*, which may be granted or not, according to the circumstances of the case. (2 Crompt. 436, 437. 1 Salk. 92. 1 Com. Dig. 652, 653, E. 3 and 5.)(b)

3. The proper process, where the party is not in active custody, or where he sues *quia timet*, is a *venire facias*. (1 Salk. 92. 2 Crompt. 443. 1 Com. Dig. 650, 651.) The process applied for is, therefore, proper, if the writ of *audita querela* be well brought.

The principle on which the writ is brought, and endeavored to be maintained by the plaintiffs, is, that the judgment was paid and satisfied by Stout, one of the defendants thereto, and was thereby discharged, and cannot again be set up by him and acted upon against White, notwithstanding the circumstances under which Stout *was [*230] obliged to pay it, and the agreement between him and the then plaintiff, Vredenberg.

On the part of the defendant, it is objected, 1. That the matter, on which this writ is brought, is the same that was offered in chancery, and on which that court refused to interpose; that the merits have been there decided; and it being

(a) See note (a), p. 262, to *Wardell v. Eden*.

(b) *Id.*

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the decision of a court to which the question properly belonged, this court ought not now to interfere.

2. That on the merits, Stout is to be considered in the light of a surety, and in equity is entitled to the benefit of this judgment; and that the plaintiffs, as assignees, could only take the property of White, subject to his equitable lien.

As to the first point; the proceedings in chancery do not fully appear. In the affidavit of the defendant's counsel it is stated that he is informed, and believes, that this application is founded on the same matters, the merits of which were determined in the court of chancery. If the determination of that court ought to preclude the remedy sought here, the whole proceedings, with the bill and answers, ought to have been shown, that we might fully see the grounds on which that court went. But from the circumstance, that the injunction was there retained for six months, in order to afford the opportunity of proceeding at law, it is to be inferred that that court intended to leave the parties to their legal remedy, without restraint or prejudice to their legal rights. If it had finally decided on their rights, and concluded them by its decree, it would rather have enjoined the present plaintiff from proceeding at law, than have continued the former injunction.

3. On the merits, I am inclined to think, that after the dissolution of the partnership between White and Stout, and White's undertaking to pay the whole of the partnership debts, Stout, in relation to him, is to be considered as a surety merely; and if so, he is entitled to all *equitable liens on the property of White. (2 Vernon, 608. 1 Vesey, 251. 2 Vesey, 100, 371.) It was competent for him and Vredenberg, the original plaintiff, to make the agreement, that he should have the benefit of the judgment. A court of equity would allow Stout to proceed for that purpose, on the judgment, in the name of Vredenberg, and an *audita querela*, being in the nature of an equitable suit, we ought not to grant a *supersedeas* to the prejudice of the equitable rights of Stout. The plaintiffs here, as assignees of an insolvent, for the benefit of his creditors, do not stand in a better condition than

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any other assignee or purchaser of White would do. They must take the property, subject to all equitable claims.(a)

The granting a *supersedeas* being in the discretion of the court, we are of opinion that under the circumstances of this case, it ought not to be allowed.

Motion denied.

(a) It is a general principle, that a surety who pays the debt of his principal is entitled to the securities which the creditor holds against him. This is accurately expressed by Chancellor Walworth, in *Eddy v. Traver*, (6 Paige R. 521, 524) "It is an established principle of equity that sureties, or those who stand in the situation of sureties for those who pay a debt for them, are entitled to stand in the place of the creditor, or to be subrogated to all his rights as to any fund, lien or equity which he may have against any other person or property on account of the debt. Lord Brougham, in the case of *Hodgson v. Shaw*, (3 Mylne & Keen, 190, 191, 192,) puts this doctrine in a strong light. "The rule here," says he, "is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety, paying off a debt, shall stand in the place of the creditor, and have all the rights, which he has, for the purpose of obtaining his reimbursement. It is hardly possible to put this right of substitution too high; and the right results more from equity than from contract or *quasi* contract; unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication. The doctrine of the court in this respect was luminously expounded in the argument of Sir Samuel Romilly, in *Craythorne v. Swinburne*, (14 Ves. 159;) and Lord Eldon, in giving judgment in that case, sanctioned the exposition by his full approval. 'A surety,' to use the language of Sir S. Romilly's reply, 'will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having a right to have those securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor.'" (*Cuyler v. Ensworth*, 6 Paige R. 32. *King v. Baldwin*, 2 Johns. Ch. R. 554. *New York State Bank v. Fletcher*, 5 Wend. R. 85. *Beardsley v. Warner*, 6 id. 610. *Clason v. Morris*, 10 Johns. R. 525. *Powell v. Smith*, 8 Johns. R. 249. *Patterson v. Pope*, 5 Dana, 243. *Pride v. Boyce*, 1 Rice Eq. R. 275. *Bank, &c. v. Adgar*, 2 Hill, S. Ca. 266. *United States Bank v. Stewart*, 4 Dana R. 27. *Prather v. Johnson*, 3 Harr. & John. 487. *Reed v. Emery*, 1 Serg. & Rawle, 339. *Greiner's Estate*, 2 Watts, 414. See act of Congress, March 2, 1799. *Childe v. Shoemaker*, 1 Wash. C. C. 494. *Pigou v. French*, id. 278. *Norton v. Soule*, 2 Greenleaf, 341. *Parsons v. Briddock*, 2 Vern. 608. S. C. 1 Eq. Ca. Ab. 93. *Mayhew v. Crickett*, 2 Swanst. 185. S. C. 1 Wils. C. C. 418. *Praed v. Gardiner*, 2 Cox, 86. *Earl of Rosse v. Sterling*, 4 Dow, 442. *Beckett v. Micklethwaite*, 6 Madd. 199. *Capel v. Butler*, 2 Sim. & S.

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457. *Lord Harborton v. Bennett*, 1 Beat. 386, and see *Ex parte Rogers*, 4 Deac. & Ch. 623. S. C. 2 Mont. & Ay. 153, and the observations of Lord Brougham, C., in *Hodgson v. Shaw*, 3 Myl. & K. 183, and of Sir W. Grant, M. R., in *Wright v. Morley*, 11 Ves. 12, of Lord Eldon, C., in *Copie v. Middleton*, T. & Russ. 224, and of Lord Hardwicke, C. in *Ex parte Crisp*, 1 Atk. 133. *Watkins v. Flanagan*, 3 Russell, 421. *Ward v. Henly*, 1 Younge & Jervis, 225. *Ex parte Houston*, 2 Glyn & Jamieson, 36. *Ex parte Gee*, 1 id. 330. *Ex parte Sergeant*, 1 id. 183. *Ex parte Brook*, 2 Rose, 334. *Robinson v. Wilson*, 2 Maddock, 434. *Glossop v. Harrison*, 3 Ves. & Beam. 134. Coop. 61. *Ex parte Rushforth*, 10 Vesey, 409. *Hill v. Kelly*, 1 Ridg. Lap. & Sch. 265. *Ex parte Badger*, 1 Cox, 28. See *Bathurst v. De La Zouch*, Dick. 460. *Francis v. Rucher*, Amb. 674. *Lee v. Rook*, Mosely, 318.)

By the Code Napoleon, (§ 2029,) the surety who has paid the debt is subrogated to all the rights which the creditor had against the debtor. The Codes of Sardinia, (§ 2066, § 2069,) of Austria, (§ 1358,) of Prussia, (§§ 338, 339; see also § 311; see the Code of the Canton du Vaud, §§ 1506—1513.) and of Bavaria, (Lib. 4, ch. 10,) accord with the French Code. This rule existed substantially in the civil law. The law of the Digest, not giving the benefit of discussion to those who became sureties, (Pothier ad Pand. ed. 1823, vol. 19, p. 49,) although the more ancient law had done so, (Id. p. 43, *et seq.*) usage introduced another manner of relieving sureties by compelling the creditor to transfer his securities to the surety who was ready to pay the amount due. “Fidejussoribus succuri solet ut stipulator compellatur et qui solidum solvere paratus est, vendere ceterorum nomina.” (Pothier ad Pand. Lib. 46, § 45.) For this reason, Julian observed, “If you have loaned to Titus a sum of ten pieces on my mandate, and you sue me upon the mandate, Titus will not be released, and you can only recover upon ceding to me your rights of action (*actiones*) against him. “Si mandatu meo, Titio decem credideris, et mecum mandati egeris, non liberabitur Titius: sed ego tibi non aliter condemnari debebo, quam si actiones, quas adversus Titium habes, mihi præstiteris.” (L. 13, Julian. Lib. 14, Digest.) The creditor (says Pothier) is held to cede not only the right of action which he has against the principal debtor, but also all those which are accessory to it; as for example those that he has against the other sureties and upon pledges which he has received. Neque solum actionem quam habet adversus reum principalem, sed et omnia hujus actionis accessoria, cedere creditori tenetur; puta, actiones adversus ceteros adpromissores, et pignora. (Poth. ad Pand. vol. 19, p. 50, ed. 1823.) Hence the rescript of Diocletian and Maximien: As the creditor has the right to sue the sureties before the debtor, so it is right that the surety who requires it shall not be obliged to pay until the securities and pledges of the creditor shall have been ceded to him. “Sicut eligendi fidejussores creditor habet potestatem, ita intercessorem postulantem cedi sibi hypothecam, sive pignoris obligata jure, non prius ad solutionem nisi mandata super hac re fuerit persecutio, convenit urgeri.” (L. 21, Cod. 8, 41, h. tit.) Ab hac regula hic fiscus excipitur. (Paulus, l. 45, § 9, ff. 49, 14 de jur. fisci. (Paul. lib. 5 sent. l. fin. Cod. 7, 73 de privileg. fisci.)

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It was made a question in the civil law how the creditor, who had been paid, could transfer any rights of action, for when he, who has a debtor and sureties, having received payment from one of the sureties, cedes his rights of action, it may be said that he has none, since he has received that which was due to him, and that all the sureties are discharged; but this is not so, because he has not received in payment, but, as it were, sold his claim against the debtor, and consequently he has rights of action that he ought to transfer to the surety, who buys them on paying the price, "quum is qui et reum et fidejussores habens, ab uno ex fidejussoribus accepta pecunia, præstat actiones: poterit quidem dici nullas jam esse, quum suum percepserit, et perceptione omnes liberati sunt. Sed non ita est: non enim in solutum accipit, sed quodammodo nomen debitoris vendidit, et ideo habet actiones, quia tenetur ad id ipsum, ut præstat actiones." (L. 36; Paul. lib. 14, ad Plaut.) Pothier expresses this more clearly when he declares the signification of this passage to be, that it is wrong to say that the surety has no existing right of action that he can transfer; on the contrary, as he is held to transfer such rights to the surety, who pays him upon this condition, he does not receive his money in payment, but as the price of the right which he ought to cede to him. Sensus est: *Et ideo perperam dicitur eum nullas habere actiones quas cedere possit, imo habet actiones, quia, quum ad id ipsum teneatur, ut præstat actiones fidejussori ea lege solventi ut sibi cedantur: pecuniam non tanquam in solutum, sed tanquam in pretium actionum quas ei cedere tenetur, accipere debet.* (Poth. ad Pand. Lib. 46, tit. 1, § 46, n. 1.)

But let us remark, in passing, that although this rule does not seem to have been adopted in the English jurisprudence, Mr. Justice Story, who seems to regret that the Roman rule was not adopted, speaks thus in his Commentaries on Equity Jurisprudence; (4th ed. §§ 499 b. 499 c. and 499 d.): "Another point, of more extensive importance in practice, is, Whether a surety, who pays off the debt of the principal, for which he is bound, is entitled to require the creditor, upon such payment, to make an assignment to him of the debt, and of the instrument by which it is evidenced. It seems formerly to have been thought that he had such a right; and the general language of some of the authorities, that the surety is in such cases entitled to every remedy which the creditor had against the principal, was supposed fully to justify and support this conclusion. (*Ex parte Criepe*, 1 Atk. 135. *Parsons v. Briddock*, 2 Vern. R. 608. *Wright v. Morley*, 11 Ves. 12, 21, 22. *Dowbiggin v. Bourne*, 1 Younge R. 111. S. C. 2 Younge & Coll. 464. *Butcher v. Churchill*, 14 Ves. 567, 575, 576. *Ex parte Rushforth*, 10 Ves. 409, 414. *Robinson v. Wilson*, 2 Madd. R. 464. *Craythorne v. Swinburne*, 14 Ves. 160, 162. See also *Hodgson v. Shaw*, 3 Mylne & Keen, 183, 185. *Hotham v. Stone*, 1 Turner & Russ. R. 226, note. *Butcher v. Churchill*, 14 Ves. 568, 575, 576.) But the doctrine is now fully established, that the surety has no such right to be enforced in equity; and that he cannot insist upon any such assignment. The ground is, that, by the payment of the debt, the title derived under the instrument has become extinguished, and *functus officio*; and, therefore, an assignment thereof would be utterly useless; and, if the surety should afterwards sue for the debt at law, in

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the name of the creditor, the principal might plead such payment in bar of the action. (*Woffington v. Shaw*, 2 Ves. 569. *Gammon v. Stone*, 1 Ves. 339. *Copis v. Middleton*, 1 Turn. & Russ. 224, 229. *Jones v. Davids*, 4 Russ. R. 297. *Hodgson v. Shaw*, 3 Mylne & Keen, 183. *Hudson v. Stalwood*, Cas. Tem. Hard. 133. *Armitage v. Baldwin*, 5 Beav. R. 278.) In such a case it would make no difference in the right of the surety to sue, that, upon payment of the debt, he had procured an assignment thereof to be made to a third person, instead of to himself for his benefit. (See *Reed v. Norris*, 2 Mylne & Craig, 361. *Jones v. Davids*, 4 Russ. R. 277. *Copis v. Middleton*, 1 Turn. & Russ. 224, 229. But see *Butcher v. Churchill*, 14 Ves. 568, 575, 576.) Neither would it make any difference, that several judgments had been obtained by the creditor against the principal and surety, and that the latter had paid the debt on the judgment against him, and then sought an assignment to be made of the judgment against the principal; for the judgment would be effectually extinguished by such payment; and the surety would not be permitted to avail himself of it against the principal. (*Dowbiggin v. Bourne*, 2 Younge & Coll. 464. But see *Hill v. Kelly*, 1 Ridg. L. & Schoales R. 265.) The error of the contrary opinion, if, indeed, upon the principles of enlarged equity, any there be, seems to have arisen from confounding the right of the surety, on payment of the debt, to be substituted for the creditor, and to have an assignment of any independent collateral securities, with the supposed right to have the original debt assigned. Such independent collateral securities may well be required to be assigned by the creditor, in favor of the surety; because, in many cases, the principal would not be entitled to have a re-transfer thereof from the surety, without paying him the sums advanced by him to the creditor, as a matter of equity between the parties. But the assignment of the debt itself, which had been already paid, would be a mere nullity in equity, as well as at law, since it could not have, in the hands of the surety, any subsisting obligation. Upon reasoning somewhat analogous to that, the supposed error of which we have been considering, it was formerly held, that if a surety upon a bond should discharge it, he would be entitled to be considered as substituted for the original creditor, as a specialty creditor of his principal; and, consequently, in the marshalling of the assets of the principal, he would, as to the debt so paid, have a priority over simple contract creditors. (*Hotham v. Stone*, 1 Turn. & Russ. R. 226, note. *Robinson v. Wilson*, 2 Madd. R. 464. *Wright v. Morley*, 11 Ves. 22. *Powell's Ex'ors v. White*, 11 Leigh R. 309, fully approves this same doctrine.) But upon this point, also, a different doctrine is now established; and it is held, that a surety, so paying a bond debt, will be treated, in marshalling assets, as a mere simple contract creditor. (*Copis v. Middleton*, 1 Turn. & Russ. 224, 229, 231. *Jones v. Davids*, 4 Russ. R. 277. *Hodgson v. Shaw*, 3 Mylne & Keen, 183.) The ground of this doctrine is, that the surety is not subrogated to the rights of the creditor, in such a case (whether he has procured an assignment of the bond, when paid, or not;) but he is in fact, as well as in law, to be deemed only as having paid money for the principal upon the footing of an implied contract of indemnity subsisting between them. Yet there are many cases, in which a surety, paying a debt, will be entitled to

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stand in the place of the creditor, or to obtain the full benefit of all the proceedings of the creditor against the principal. Thus, for example, if the creditor, in case of the bankruptcy of the principal, has proved his debt before the commissioners, and then the surety pays the debt, the latter will be entitled to the dividends declared on his estate, and the creditor will be held to be his trustees for this purpose. (*Ex parte Rushforth*, 10 Ves. 409. *Wright v. Morley*, 11 Ves. 12, 22, 23. *Watkins v. Flanagan*, 3 Russ. R. 421. *Ex parte Houston*, 2 G. & Jamieson, 36. *Ex parte Gee*, 1 G. & Jamieson, 330.) So, the surety may compel the creditor to go in and prove his debt before the commissioners; and, then, if he pays the whole debt, the creditor will in like manner become a trustee of the dividends for him. (*Ex parte Rushforth*, 10 Ves. 409, 414. *Wright v. Simpson*, 6 Ves. 734.) In cases of this sort, courts of equity seem to be regulated by the same principles which govern their interference in favor of sureties, to compel creditors to proceed in the first instance against the principal for the recovery of their debts." (Story's Eq. Jur. 4th ed. § 327; id. § 698.)

It is worthy of observation, that the surety to whom securities have been transferred does not take the place of a purchaser; for if so, he might retain them, notwithstanding the debtor should pay the whole debt, but only of him who originally received the securities, the reason for which they were given being to pay the principal and interest. "Paulus respondit: Fidejussorem, in quem pignora a confidejussoribus data translata sunt, non emptoris loco substitutum videri, sed ejus qui pignora accepit: et ideo rationem fructuum et usurarum haberi oportere." (L. 59, lib. 4, respons.) Again, this cession of rights of action does not exist absolutely, but only when the surety has demanded it upon paying; if he has not done so, there remains to him only the action *mandati* or *negotiorum gestorum* against his principal. Hence Gordianus observes: "Mandati actio personalis est: quæ si nomine fidejussoris, vel adversus debitorem, seu heredes ejus competit, præses provinciae, quæ deberi compererit, reddi jubebit. Pignora etenim, quæ reo stipulandi nexa fuerunt, ita demum ad vos transeunt, si facta nominis redemptione solutio celebrata est, vobisque mandatæ sunt actiones. Quod si factum est, ea quoque vobis persequentibus, adversus pignorum possesores extraordinariam jurisdictionem idem vir clarissimus impertiatur." (L. 14, cod. 8, 41, h. tit.) The cession of rights of action ought to be made at the same time as the payment, and not afterwards, unless it may have been made upon that condition. (Poth. ad Pand. Lib. 46, tit. 1, § 49.) For this reason "Modestinus respondit: Si post solutum sine ullo pacto omne quod ex causa tutelæ debeatur, actiones post aliquod intervallum cessæ sint: nihil ea cessione actum, quum nulla actio superfuerit. Quod si ante solutionem hoc factum est, vel quum convenisset ut mandarentur actiones, tunc solutio facta esset, mandatum subsequutum est: salvas esse mandatas actiones; quum novissimo quoque casu pretium magis mandarum actionum solutum, quam actio quæ fuit, perempta videatur." (L. 76, ff. 46, 3, de solutionib. lib. 6, respons.)

The right of subrogation equally exists, whether the surety knew of the security or not. (*Mayhew v. Crickett*, 2 Swaust. 185. S. C. 1 Wils. C. C.

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418. *Praed v. Gardiner*, 2 Cox, 86.) And so careful is the law that the creditor shall do nothing to prejudice the surety, that if securities have been lost, (*Ex parte Muir*, 2 Cox, 63; *Williams v. Price*, 1 Sim. & Stu. 581,) or permitted to pass into the hands of the principal, (*Capel v. Butler*, 2 Sim. & Stu. 457; *Law v. The East India Co.* 4 Vesey, 824,) or have become lessened in value, in consequence of the neglect or default of the creditor, the sureties' liability to him will be diminished to the extent of the injury he has sustained. (*Lord Harborton v. Bennett*, 1 Beat. 386. *Phillips v. Astling*, 2 Taunt. 206. *Blissard v. Hirst*, Burr. 2670. *Goodall v. Dolley*, 1 Term R. 712. *Warrington v. Furber*, 8 East, 242. S. C. 6 Esp. 89. *Holbrow v. Wilkins*, 1 Barn. & Cresw. 10. Lord Ellenborough in *Claridge v. Dalton*, 4 Maule & Selw. 226. See *Lafitte v. Slatter*, 6 Bing. 623.)

The civil law accords with this rule, for the creditor was barred by an exception that by his fault he found himself unable to transfer the rights of action against the debtor. Per hanc exceptionem repellitur creditor, non solum si nolit cedere suas actiones adversus reum et confidejussores, sed et si culpa sua contigerit ut eas non possit cedere. (Pothier ad Pand. Lib. 46, tit. 1, § 47.) Therefore Papinian has said: "Si creditor a debitore culpa sua causa ceciderit, prope est ut actione mandati nihil a mandatore consequi debeat, quum ipsius vitio acciderit, ne mandatori possit actionibus cedere." (L. 95, § 11, ff. 46, 3, de solutionib. Papin. lib. 28, quest.)

It is said, however, that to entitle the surety to avail himself of the securities which the creditor has, they must have been deposited, (*Wade v. Coope*, 2 Sim. 155; by Lord Eldon in *Ex parte Kendall*, 17 Ves. 514; S. C. 1 Rose, 71,) assigned, (*Wright v. Morley*, 11 Ves. 12,) or made chargeable, (*Praed v. Gardiner*, 2 Cox, 86,) in respect of the same transaction in which the surety became liable. (Pitm. Princ. & Sur. 114. Burge on Suretyship, 353.) Thus a husband entitled, in right of his wife, to a sum of bank annuities standing in the names of trustees, assigned the dividends to secure an annuity. The bank annuities had not been reduced into possession, the court of chancery decided that the surety who had been called upon, and had made some payments in respect of the annuity, was, as to payments of the annuity, actually made by him, entitled to stand in the place of the creditor, and to be reimbursed out of the dividends, and that he had also an equity to have the fund applied in his exoneration. (*Wright v. Morley*, *supra*.) A principal in a bond, being arrested, gave bail; judgment was recovered against the bail, and the surety was afterwards called upon to pay and paid the debt; it was held that he was entitled to an assignment of the judgment against the bail; for though the bail themselves were but sureties as between them and the principal debtor, yet coming in the room of the principal debtor, as to the creditor, it was held that they likewise came in the room of the principal debtor as to the surety. (*Parsons v. Bridgock*, 2 Vern. 608. S. C. 1 Eq. Ab. 93. See Lord Brougham's judgment in *Hodgson v. Shaw*, 3 Myl. & K. 189. See Burge on Suretyship, 353, 354.)

The civil law also agrees here. "Creditori, qui pro eodem debito et pignora et fidejussorem accepit, licet (si malit) fidejussorem convenire in eam pecuniam, in qua se obligaverit. Quod quum facit, debet jus pignorum in eam

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transfere. Sed quum in alia quoque causa eadem pignora vel hypothecas habet obligatas, non prius compellendus est transferre pignora, quam omne debitum exsolvatur." (L. 2, cod. 8, 41, h. tit. Severus et Antoninus.)

The securities also must be of such a nature as "continue to exist and do not get back upon payment, to the person of the principal debtor." (Per Lord Eldon, in *Copis v. Middleton*, T. & R. 224.) Thus, if principal and surety are obligors in a bond, the one as principal, and the other as surety, and no other assurance is executed to the creditor, and the surety, upon being applied to by the obligee for payment, pays the money due upon the bond, the bond thereby becomes extinguished, and all remedy upon it is at an end: (*Gammon v. Stone*, 1 Ves. 339; *Waffington v. Sparks*, 2 Ves. 569; *Copis v. Middleton*, T. & R. 224;) and an assignment of it to the surety, who pays it, is of no use; (*Jones v. Davids*, 4 Russ. 277;) since even the principal might plead payment to an action brought against him in the name of the obligee; (*Waffington v. Sparks*, *supra*;) and consequently the surety cannot insist upon its assignment. So where the principal and surety gave to the creditor a joint and several promissory note, and the creditor brought separate actions against the principal and surety, and recovered judgment in both actions; and upon execution issued upon the judgment obtained against the surety, the surety paid the debt and costs: upon bill filed by the representatives of the surety, for the purpose of obtaining an assignment of the judgment, which had been recovered against the principal debtor, it was held, that the creditor having been paid his debt, the judgment was satisfied, and the creditor would not have been permitted to have proceeded upon it at law against the principal; and it not being available at law in his hands, neither was it available in equity in the hands of the surety, and consequently that the surety could not compel an assignment of it. (*Dowbiggen v. Bourne*, 1 You. 111. S. C. 2 You. & Coll. 462. Pitman on Principal and Surety, 115, 116.)

And the payment must be of the whole debt. (*Ex parte Rushforth*, 10 Ves. 409. Burge on Suretyship, 349. Voet, lib. 46, tit. 1, n. 27. Carpz. derf. for. part 2, const. 17, def. 22. Hering. de Fidejus. cap. 27, p. 3, n. 18. Sando de Cessione, Act. 6, n. 35, 36. See also l. 21, cod. 8, 41, n. tit. cited *supra*.)

Again: if the securities and remedies of the creditor are of such a nature as may involve an expense chargeable against him, he is entitled to an indemnity against all costs and expenses. (*Beardsley v. Warner*, 6 Wend. 610. *Hayes v. Ward*, 4 Johns. Ch. Rep. 123, 132.)

Again: though a surety, who pays the debt of his principal, is entitled to be substituted in the place of the creditor, as to all the means possessed by him to enforce payment against the principal debtor; yet the surety of a surety, though compelled to pay the creditor, is not entitled to be substituted in the place of such creditor for the purpose of enforcing the payment against the principal debtor, if such debtor has paid his immediate surety. (*The New York State Bank v. Fletcher*, 5 Wend. 85. See Story's Equ. Jurisp. 499, *et seq.* Theobald's Principal and Surety, ch. 11. Pitman, *ut sup.* Burge on Suretyship, *et seq.* where most of the civil and foreign law authorities will be found. See also Burmannus de Fidejuss. Eorumque Privilegiis and De Maruil de Fidejuss. I have taken the liberty to add a number of authorities from

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the civil and foreign law not referred to by Mr. Burge, and which I believe have never been brought to the notice of the American student in any work on suretyship.)

WARREN *against* THE UNITED INSURANCE COMPANY.

It is an implied warranty in every contract of insurance, whether on a vessel or goods, that the vessel is seaworthy, and competent to perform the voyage : And it makes no difference, though the vessel was surveyed before she sailed, and pronounced by carpenters to be competent, if she proves, in the course of the voyage, not to be seaworthy.

THIS was an action on a policy of insurance on goods shipped on board the schooner Mary, on a voyage from New York to the island of St. Thomas.

The schooner sailed from New York on the voyage insured, the 12th May, 1799. On the 14th May, the wind blowing fresh, she sprung a leak, in consequence of which the master, for the preservation of the lives of the crew, was obliged to put into Bermuda, which was the nearest port, where the vessel arrived on the 26th May. The vessel was there surveyed by the wardens of the port of St. George, who found her timbers, planks and beams so decayed [*232] and rotten, that they considered *her as unfit to repair. The schooner had been overhauled before she left New York, and some repairs put upon her upper works ; but no measures were taken to examine her lower works, or to ascertain the state of her timbers ; but the carpenters supposed, from the appearance of the upper works, that she was competent to perform the voyage. The plaintiff was not the owner of the vessel, but the freighter only. On receiving news of the arrival of the vessel at New York, the plaintiff abandoned the goods to the defendants, and brought the present action to recover a total loss. The jury found a verdict for the plaintiff.

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A motion was made to set aside the verdict as against evidence.

Troup and Harison, for the defendants.

B. Livingston, contra.

Per Curiam. The verdict is palpably against evidence. The vessel was not competent to resist the ordinary attacks of wind and weather. On what ground the jury found the verdict, it is difficult to suppose; unless they misconceived the well settled and clear rule of law, that the want of seaworthiness in the vessel, will affect a policy on the goods, as well as on the vessel; for it is an implied warranty in every contract of insurance, whether on goods or ship, that the ship is seaworthy, and competent to perform the voyage insured. (Park, 230, 231.) The previous survey of the vessel makes no difference in the rule. The verdict ought to be set aside on payment of costs.

LEWIS, J. not having heard the argument, gave no opinion.

New trial granted.(a)

(a) To answer the implied warranty of seaworthiness, the vessel must be sufficiently sound, staunch and fit to resist the usual perils of the employment contemplated by the insurance, and get to her port of destination with reasonable expedition. She should, therefore, be manned by a crew adequate to the voyage, commanded by a skilful officer, supplied with pilots when necessary, and sufficient stores, sails, tackle, rigging, cables and anchors. (1 Phillips on Ins. ed. 1840, 308, *et seq.* Marshall on Ins. 353, 354.) A vessel constructed without knees was held unseaworthy for a foreign voyage. (*Watt v. Morris*, 1 Dow, 32.) A ship of which the timbers are decayed and the iron work loose, (*Douglass v. Scougall*, 4 Dow, 269,) or of which the captain is incompetent, (*Walden v. The Fireman's Ins. Co.* 12 Johns. 133; see *Tait v. Levi*, 14 East, 481,) or the crew inadequate, (*Silva v. Low*, 1 Johns. Cas. 184, 198,) or which has no officer capable of navigating her except the captain, on a voyage from Madras to London, (*Clifford v. Hunter*, 3 Car. & Payne, 16,) or no pilot where it is customary to have one, (*Law v. Hollingsworth*, 7 Term R. 160; *Stanwood v. Rich*, 1 Phillips on Ins. 315,) or no proper supply of sails, (*Wedderburn v. Bell*, 1 Campbell, 1,) anchors and cables, (*Wilkie v. Geddes*, 3 Dow, 57,) fuel and candles, (*Fontaine v. Phoenix Ins. Co.* 10 Johns. 58,) or no medicine chest, where one is required for the voyage, (see *Wolf v. Claggett*, 3 Esp. 257; as to stowing water below deck in certain voyages, see *Warren v. Man. Ins. Co.* 13 Pick. 518,) is unseaworthy. (See a very full consideration of this question in Phillips and Marshall, *ut sup.*)

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*FAUGIER *against* HALLETT.

An adjustment of loss endorsed on a policy of insurance, and signed by the insurer, is not conclusive; and the party may show, that it was made on the misrepresentation of the insured; and whether such misrepresentation preceded from design or mistake, makes no difference.

If a person proceeds upon the information of another to do an act in his favor, the person in whose favor the act is to be done, is bound, at his peril, to see that the information given is correct.

THIS was an action on a policy of insurance, "at and from New York to Havana, upon French property, on all kinds of goods, &c. laden on board the brig Experience. The property was warranted by the assured, "free from any charge, damage, or loss, in consequence of any seizure or detention, for or on account of any illicit or prohibited trade, or trade in articles contraband of war."

The sum insured was 4000 dollars. There was a written memorandum, at the foot of the policy, by which it was agreed, that in case of capture or loss, there should be no other proof of property but the policy.

The declaration stated, that the plaintiff was sole owner of the goods insured, and had goods on board, at the time, to the value of 20,000 dollars, and that the vessel and cargo, during the voyage, was captured by an English privateer and totally lost. That the defendant, on the 12th November, 1799, subscribed an adjustment, promising to pay ninety-eight per cent. on the amount of his subscription, in thirty days.

The policy and adjustment were produced at the trial, and the plaintiff relied on them to entitle him to recover.

The defendant offered to prove, that the plaintiff had in fact saved a great part of his goods, consisting of lace and jewelry; that when the agent of the plaintiff demanded payment of the insurers, no proof was exhibited of any part of the goods being saved, but only of the capture and total loss. That after the adjustment was agreed to, the insurers received information of that fact, and on applying to the

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agent of the plaintiff, *he said that the articles saved [*234] were not intended to be insured by the plaintiff ; that had these circumstances been known to the defendant at the time, he would not have signed the adjustment. This evidence offered by the defendant, was rejected by the judge, under whose direction the jury found a verdict for a total loss.

A motion was made to set aside the verdict, and for a new trial.

Pendleton, for the defendant.

B. Livingston, contra.

RADCLIFF, J. On the trial, the plaintiff produced the policy and the adjustment, and relied on them alone for a recovery. The defendant offered to prove, that the adjustment was made on a false, or mistaken representation of the loss on the part of the plaintiff, and that instead of a total, it was, in fact, a partial loss, amounting to 1262 dollars, besides a dozen or fifteen sword blades, the residue of the property being saved. Strong evidence to this effect was offered, and overruled in consequence of which the plaintiff recovered for a total loss.

The first question is, whether the defendant was concluded by the adjustment. I think he was not. The insurer, in the event of a loss, as in subscribing a policy, acts wholly on the representation of the insured. He cannot be supposed to know the situation of the subject insured, or the accidents which may have attended it. The insured is therefore bound in good faith to represent the truth. If he misrepresents, it can only be done through fraud or mistake, and in either case, he ought not to be benefitted by it. I think the rule is obvious and universal, and where one party is obliged to act on the representation of another, he cannot be *concluded, if that representation after- [*235] wards appear to be untrue. In relation to adjustments, it has, in several cases, in the English courts, been so decided. The adjustment is *prima facie* evidence only, and may be rebutted. (Peake's Ev. 108, 109. Beawes, 308.)

On this ground alone, the verdict ought to be set aside,

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It is unnecessary, therefore, on the present motion, to decide the other questions, whether a policy on goods generally, will extend to goods which are not regularly a part of the cargo, or for which no bill of lading was given, or to pronounce the effect of the warranty as stated.

KENT, J. Upon the facts in this case, I am of opinion that the testimony offered ought to have been received. The plaintiff, at the time of the adjustment, did not know the whole case as it then stood. The adjustment was, consequently, founded upon mistake, or at least, the testimony offered was so material to the point, that it ought to have been submitted to the jury. An adjustment is not conclusive, if the party can show that it was made on the misrepresentation of the insured, and whether the misrepresentation proceeded from mistake or design, is immaterial. It is a just and sound rule, that if one person proceeds upon the information of another, to do an act in his favor, the person in whose favor the act is done, is bound at his peril, to see that the information be correct.

I am of opinion, therefore, that a new trial be granted, with costs to abide the event.

LANSING, Ch. J. was of the same opinion.

LEWIS, J. absent.

New trial granted.(a)(b)

(a) [Old note.] Park on Ins. 6th ed. 163, 167. Marshall on Ins. 2d ed. 632, 636.

(b) An adjustment of a loss is an admission between the assured and underwriter, by which the loss is settled or adjusted at a certain amount. It is usually made by endorsing on the policy, "adjusted this loss at ——— per cent." (Park, 192. 2 Phillips on Insurance, 521.) The form, however, is not material. Lord Ellenborough, in *Herbert v. Champion*, (1 Campb. 134,) observed, "perhaps if properly stamped it might be declared on as a promissory instrument;" but no cases have been found to sanction this view of the subject. Undoubtedly an adjustment, like any other settlement, might be placed in such a form that the assured could bring an action upon it without setting forth the policy particularly; (*Rogers v. Mayler*, Park, 194; *Christian v. Combe*, 2 Esp. 489; 2 Phillips, *ut sup.*;) and in such a case it would be subject to the same general rules that control other instruments of the class to which it might belong. But practically it is used as evidence to support the claim of the assured. In effect it is an admission of all the facts necessary to be proved by the assured to enable him to recover in an action on

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*SLEGT, Administratrix of SLEGT, *against* [236]
KANE.

Where a person was convicted by the act of forfeiture and attainder, passed the 22d October, 1779, of adhering to the enemies of the state and all his property, real and personal, declared to be forfeited, it was held, that he could not, after his return to the state, in 1791, maintain an action for rent which had accrued prior to the 20th October, 1799.

Nor could he set off the rent against the demand of the plaintiff, in an action against him.

THIS was an action of *assumpsit*, on a promissory note, made by the defendant, to the intestate, dated the 17th December, 1777, for 100 pounds, payable on demand.

the policy, (2 Greenl. Ev. 319, § 393,) to the amount stated in the adjustment ; and like any other admission, may be shown to have been made under ignorance or mistake of facts, or under the fraudulent influence of the assured or his agent. (See *Haigh v. De la Cour*, 3 Campbell, 319. *Steel v. Lacy*, *infra*.)

In *Dow v. Smith*, (1 Caines, 32,) the court said, "an adjustment cannot be opened except on the ground either of fraud, or mistake of facts not known," and this remark is adopted by Chancellor Kent, in his *Lecture on Marine Insurance*, (Comm. vol. 3, p. 339. See *Steel v. Lacy*, 3 Taunt. 285.) Mr. Phillips, in discussing this rule, considers if an adjustment be made from a mistake of a fact, into which mistake one party is led by the concealment or misrepresentation of the other, or without any neglect on his own part, it will not be binding upon the party who assented to it, in consequence of such mistake. An adjustment is set aside on this ground, very much upon the principles on which a policy is made void by a concealment or misrepresentation. It is a general rule, that money paid in consequence of a mistake of facts, may be recovered back ; and that a promise to pay money is not binding, if made in consequence of such a mistake, where the party promising has not fallen into the mistake by his own negligence, or is not understood, from the circumstances, or his agreement, to take the risk of the facts. (2 Phillips on Insurance, ed. 1840, p. 524, 525.) Thus, insurance being made "free from capture in port," an adjustment was made and the premium returned, on the supposition that the loss had been by capture in port. It afterwards appeared that the loss had been by capture not in port. The underwriter was held to be liable notwithstanding the adjustment. (*Reyners v. Hall*, 4 Taunt. 725.) It has been made a question, whether a mistake of law will avoid an adjustment ; but although Lord Kenyon seems to have supposed it would, (*Rogers v. Mayler*, 2 Esp. 489,) his opinion has been rejected in the subsequent cases. (*Belbey v. Lumley*, 2 East, 469. *Elting v. Scott*, 2 Johns. 157. *Stevens v. Lynch*, 12 East, 38. See 2 Phill. *ut sup.*) As to conditional adjustment, see 2 Phill. 523.

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The defendant pleaded, 1. *Non assumpsit*; 2. *Non assumpsit infra sex annos*; 3. Payment, with notice of a set-off against the plaintiff, for rent due to the defendant, on the 20th October, 1779, from the intestate, for the use and occupation of a house and farm, belonging to the defendant in Fishkill, from the 17th December, 1777, to the 20th October, 1779.

There was a replication to the second plea, and a rejoinder, to which the plaintiff demurred. The cause was tried on the first and third issues, at the New York circuit, in December, 1800, before Mr. Justice Lewis, when a verdict was found subject to the opinion of the court, on the following case, with liberty to either party to turn it into a special verdict.

On the 17th December, 1777, the intestate sold and conveyed to the defendant in fee, a farm, consisting of 59 acres, with the dwelling house, &c. in the town of Fishkill, for 2400 pounds, and the note in question was given in part of the consideration money. At the time of the sale it was agreed, that the intestate should retain the possession of the farm, during the war then existing between Great Britain and the United States, at a reasonable rent, to be paid by the intestate to the defendant.

The defendant was a British subject, and resided, long before and after the declaration of independence, in the county of Dutchess, but left his abode on the 1st August, 1777, and removed to the city of New York, then in the possession [*237] of the British forces, where he remained with the British until the evacuation of the city, the 25th November, 1783, when he removed with the British army, and did not return to the United States, until the 1st September, 1793. The present suit was commenced against him the 2d August, 1794. The plaintiff had remained in possession of the house and farm from the 17th December, 1777, to the 20th October, 1779, without paying any rent. On the 22d October, 1779, an act was passed by the legislature of the state, "for the forfeiture and sale of the estates of persons who have adhered to the enemies of the state," &c.

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by which the defendant was, by name, *ipso facto*, convicted and attainted of the offence of voluntarily adhering to the enemies of the state, &c. and all and singular his estate, real and personal, was, on the day of passing the act, declared to be forfeited to, and vested in, the people of the state of New York.

The question was, whether the rent claimed by the defendant could be set off against the plaintiff's demand? If the court should be of opinion, that the set-off was legal, then there was to be a judgment for the defendant for forty-four dollars and ninety-three cents, otherwise, a judgment for the plaintiff for two hundred and twenty-one dollars and sixty cents, according to the verdict.

Troup, for the plaintiff.

Riggs, contra.

Per Curiam. Although the note in question was given for the consideration money of the farm, the plaintiff's retaining possession of the farm, or hiring it, was not made a condition of the purchase. They were not parts of one contract, and dependent on each other, and are, therefore, to be considered as distinct transactions.

**Choses in action* may be, and were expressly [*238] confiscated by the act now in question. The plaintiff's title to the rent was, therefore, transferred, by the forfeiture of his real and personal property, to the people. His right to the estate itself, from which the rent was to accrue, was forfeited, and became vested in the people of this state. The consideration for the rent, therefore, failed, and he can neither sustain an action for it, nor set it off in the present suit.

The treaty of peace does not affect this case. As to the previous forfeitures and confiscation, it is only recommendatory, and by implication, confirms their validity, if not rescinded, in pursuance of that recommendation. It would be sufficient if the treaty were silent; for all acts of the belligerent parties not affected by it, and as they existed at the time of concluding the treaty, were, of course, recognized as just and lawful, and remained in the same state. This rule ap-

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pears to be adopted in the construction of all treaties. (Vattel, b. 4, c. 2, s. 21.)

The plaintiff is, therefore, entitled to recover.

KENT, J. having formerly been counsel in the cause, gave no opinion.

LEWIS, J. absent.

Judgment for the plaintiff.

[*239] *DOLE, Sheriff, *against* BULL AND PORTER.

If a bond be taken by the sheriff for the ease and convenience of the prisoner, so that he may go at large within the walls of the prison, and conditioned that he shall remain a true and faithful prisoner, it is not a bond for ease and favor, nor void, though not taken in the manner directed by the act relative to jail liberties.

A bond taken by the sheriff, that a person in execution shall remain a true and faithful prisoner, is valid.

A bond taken by the sheriff to induce a less vigorous imprisonment is good, if the indulgence be such as he would otherwise, consistently with his duty, be authorized to grant; but, if it confer a privilege inconsistent with his duty by which the object of the imprisonment, as a means to compel a satisfaction of the plaintiff's demand, may be impaired or defeated, the bond is illegal and void. (Per Radcliff, J.)

THIS was an action of debt, on a bond for 900 dollars, dated 17th May, 1798, given to the plaintiff, as sheriff of the county of Rensselaer. The declaration was in the usual form. The defendants pleaded, 1. *Non est factum*; 2. Craving *oyer* of the bond, the condition of which was as follows: "that if the above bounden Isaac Bull, now confined in the jail or prison of the county of Rensselaer, in the custody of the sheriff aforesaid, at the suit of Edward Rawson, for the sum of 458 dollars and 2 cents, shall be and remain a true and faithful prisoner in the jail or prison aforesaid, until he shall from thence be discharged by due course of law, then this obligation to be void, otherwise to remain," &c.

Which being read and heard, the said defendants say, that

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the said James his said action thereof against them ought not to have or maintain, because they say, that in and by a certain act of the legislature of the state of New York, entitled "an act regulating the liberties of jails," passed the 5th day of April, 1798, it is, among other things, enacted, in the words following, to wit: "That the several sheriffs of the respective counties shall permit any prisoner, who shall be in their custody on civil process only, to go at large within the limits of the respective liberties as aforesaid appointed; provided such prisoner shall procure and offer to such sheriffs respectively, a bond with one or more sufficient sureties, in the penalty of double the amount of the sum for which such prisoner is confined, conditioned that such prisoner shall remain a true and faithful prisoner, and shall not, at any time, or in any wise, escape or go without the limits of said respective liberties, until discharged by due course of law," as by reference to the said in part recited act, among other things, will fully and at large *appear. And [*240] the said defendants aver, that the said bond or writing obligatory was taken by the said James Dole, then being sheriff, by virtue of the said recited act, to wit, at the city of Albany, in the county of Albany; and that the said sum of 45\$ dollars and 2 cents, mentioned in the condition of the said writing obligatory, was the true sum for which the said Isaac Bull was confined in the custody of the said sheriff, and that the penalty of the said bond or writing obligatory is not of double the amount of the said sum for which the said Isaac was then confined, as by the said act is required, and is, therefore, void, and of no effect, and this they are ready to verify; wherefore they pray judgment if the said James his said action thereof against them ought to have or maintain, &c. 3. And for further plea in this behalf, according to the statute in such case made and provided, and by leave of the court for that purpose, also first had and obtained, the said defendants say, that the said James his said action thereof against them ought not to have or maintain, because they say, that the said bond or writing obligatory was taken by the said James Dole then being sheriff, by vir-

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tue and in pursuance of the directions of the said in part recited act, to wit, at the city of Albany, in the county of Albany; and the said defendants further say, that the said writing obligatory is not conditioned, that the said Isaac Bull should not, at any time, or in any wise, escape or go without the limits of the liberties of the said jail, until discharged by due course of law, as in and by the said in part recited act is directed and required, to wit, at the city, in the county aforesaid, and this the said defendants are ready to verify; wherefore they pray judgment if the said James his said action thereof against them ought to have or maintain, &c. 4. And for further plea in this behalf, according to the statute in such case made and provided, and by leave of the court for that purpose first had and obtained, the said [*241] defendant *say, that the said Isaac, on the 17th day of May, 1798, at Troy, to wit, at the city and in the county of Albany, then being in the custody of the said James Dole, sheriff of the county of Rensselaer, at the suit of the said Edward Rawson, for the said sum of 458 dollars and 2 cents, he the said James then being sheriff as aforesaid, afterwards, to wit, on the day and in the year last aforesaid, at the place in the county aforesaid, voluntarily suffered and permitted the said Isaac Bull to escape from the said jail or prison, the said Isaac Bull not having, at any time before or since the said escape, procured or offered to the said sheriff a bond with one or more sureties, in the penalty of double the amount of the said sum of 458 dollars and 2 cents, conditioned as in and by the said in part cited act is directed and required, and this the said defendants are ready to verify; wherefore they pray judgment whether the said James Dole, his said action thereof against them ought to have or maintain, &c.

The plaintiff *replied* to the *second* plea, that Bull was in custody on the *ca. sa.* at the suit of Rawson, for 458 dollars and 2 cents; that after being arrested thereon, the defendants, on the 17th May, 1798, applied to the said James Dole, then being sheriff of the county aforesaid, and then and there requested and solicited of him that the said Isaac Bull might,

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for his ease and convenience, be indulged with the liberty of going at large within the walls of the jail or prison aforesaid, and not to continue and remain any longer locked up and confined within any particular part of the jail or prison aforesaid. And they the said Isaac and John, then and there, in consideration that the said James Dole, then being sheriff as aforesaid, would grant and comply with their request aforesaid, in that respect made, offered to execute and deliver to the said James Dole, then being sheriff as aforesaid, the writing obligatory aforesaid, for the purpose of indemnifying the said James for all *damages which [242] he might in any way be put to or sustain, by means of the said Isaac Bull's escaping from and going at large without the walls of the said prison, in consequence of the said James Dole's granting and complying with the aforesaid request of the said Isaac and John, made, as aforesaid, for the particular ease, convenience and benefit of the said Isaac Bull; (the penalty whereof then to be forfeited to the said James, then being sheriff as aforesaid, whenever the condition of the said writing obligatory should be broken;) and the said James, being sheriff as aforesaid, afterwards, to wit, on the same 17th day of May, in the said year of our Lord 1798, at the town and in the county aforesaid, the said Isaac so being arrested and detained by the said sheriff, and then and there in his custody and close confinement as aforesaid, by virtue of the arrest and writ aforesaid, in consequence of the solicitation, and at the special instance and request of the said Isaac and John, made in manner and form aforesaid, for the relief, ease and convenience of the said Isaac, and in consideration of the said writing obligatory, having been then executed and delivered to the said James for the purpose aforesaid, did then and there indulge the said Isaac Bull, for his ease and convenience, with the liberty of going at large within the walls of the jail or prison of the county aforesaid, agreeably to the request aforesaid, of the said Isaac and John. And the said James further saith, that in and by the aforesaid in part recited act, it is, among other things, enacted in the words following, to

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wit : "That the several courts of common pleas in this state be, and they are hereby authorized to appoint a certain reasonable space of ground, adjacent to the several jails in their respective counties, to be denominated the liberties of the said jails, and shall cause to be entered on their respective minutes the extent of such liberties, which shall in no instance comprehend a larger space than three acres ; [*243] and shall cause the same liberties *and their limits to be designated by enclosures or posts, or other visible marks, placed on the outer lines of the said liberties, as to them shall seem meet and proper," as by reference to the said in part recited act, among other things, will fully and at large appear. And the said James avers, that the court of common pleas, held in and for the county of Rensselaer aforesaid, had not, at the time the said writing obligatory was executed and delivered, by the said Isaac and John, to the said James, then being sheriff as aforesaid, appointed a certain reasonable space of ground adjacent to the said jail in the said county of Rensselaer, denominated the liberties of the said jail, as, by the aforesaid in part recited act, the aforesaid court of common pleas was authorized to do, and that no such liberties of the said jail were appointed or assigned by the said court of common pleas, by virtue of the said in part recited act, until the next June term of the said court of common pleas, held after the said writing obligatory was executed and delivered as aforesaid ; and so the said James saith, that the said bond or writing obligatory was not taken by the said James Dole, then being sheriff as aforesaid, by virtue of the said recited act, in manner and form as the said Isaac and John have in their second plea above alleged, and this he is ready to verify : wherefore he prays judgment, and his debt aforesaid, together with his damages on account of the detaining the debt, to be adjudged to him, &c.

There was a similar replication to the *third* plea. To the *fourth* plea the plaintiff replied, that he did not voluntarily suffer and permit Bull to escape, &c. and issue thereon.

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To the replication to the *second* and *third* pleas, there was a *demurrer* and joinder.

Emott and Woodworth, in support of the *demurrer*.

Van Vechten, contra.

*RADCLIFF, J. delivered the opinion of the court. [*244]

The bond not being taken in pursuance of the act, but at common law, which is substantially alleged in the plaintiff's replications, and admitted by the demurrers, it is unnecessary to consider whether there is a material variance between the form of the bond and the directions of the act. The only question is, whether it be good, for the purpose it was taken, at common law.

The bond being conditioned, that the defendant, Bull, should remain a true and faithful prisoner, is, on the face of it, undoubtedly good; but it being alleged by the plaintiff that it was taken for the ease, convenience, and benefit of the prisoner, and to indulge him to go at large within the walls of the prison, it is contended by the defendant, that it is a bond for *ease and favor*, and therefore contrary to the statute of 23 Hen. VI. c. 10, which is enacted here. (24 Sess. c. 28, s. 13. 5 Com. Dig. tit. Pleader, p. 648, (2 W. 25.) 1 Sid. 383. Salk. 438. 2 Keb. 422. Hard. 464. 1 Saund. 161. Plow. 60 to 68.)

The question is, whether the indulgence of going at large within the walls of the prison, as admitted in the replication, comes within the definition of *ease and favor*, intended by the act.

I think it does not. It is not inconsistent with the duty of a sheriff to permit a prisoner to occupy the whole or any part of the prison. He is still, in contemplation of law, *in arcta et salva custodia*, while he is confined within the walls of the prison, and a bond, conditioned, that he shall remain a faithful prisoner, may, with as much propriety, be taken in relation to the whole, as to any part of the prison. Thus, in England, such a bond from a prisoner within the rules, which are analogous to our liberties, is held to be good. (2 Keb. 423. 1 Sid. 383.) If the sheriff may grant

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to a prisoner the whole extent of the prison, without such a bond, and at the same time not violate his duty, or incur the penalty of an escape, it would seem inconsistent that the bond should be void, when it would not be so if the prisoner were confined in a particular part of the jail.

[*245] *A distinction is taken between bonds, conditioned to remain a faithful prisoner, which are lawful, and bonds, to save the sheriff harmless against escapes, which are held to be illegal and void. The reason appears to be, that the former are consistent with the duty of the sheriff, safely to keep his prisoners, and the latter imply the consent of the sheriff to the prisoner's escape, on the alternative of an indemnity for the consequences. (Yelv. 197. 6 Mod. 225. 6 Bac. 181. Cro. Eliz. 66.)

The general rule seems to be, that a bond, taken by the sheriff to induce a less rigorous imprisonment, is good, if the indulgence be such as he would otherwise consistently with his duty be authorized to grant; but if it confer a privilege inconsistent with his duty, by which the object of the imprisonment, as a mean to compel a satisfaction of the plaintiff's demand, may be impaired or defeated, the bond is illegal and void. It is then a bond for the ease and favor of the prisoner, and contrary to the statute. So a bond, taken by the sheriff, under color of his office, to acquire profit or emolument, is also void. The statute is directed against oppression on the one hand, and an improper indulgence on the other.

In the present case, although the replication states the bond to have been given for the ease, convenience, and benefit of the prisoner, it also states the nature of that benefit, and that it did not extend a privilege beyond the walls of that jail. This explains the sense of the antecedent terms, and shows that the indulgence was not unlawful.

We are, therefore, of opinion that the bond is good, and that the manner of pleading does not affect the construction to be given to it; and, of course, that the plaintiff ought to have judgment.

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LEWIS, J. not having heard the argument, gave no opinion.

Judgment for the plaintiff.(a)

***BAKEWELL against THE UNITED INSURANCE [246]
COMPANY.**

A policy of insurance contained a memorandum, "that salt, &c. and all articles that are perishable in their own nature, are warranted by the assured, free from average, unless general; and sugar, &c. *skins, hides*, and tobacco, are warranted free from average, under seven per cent. unless general." A quantity of *deer skins*, part of the cargo, were damaged, by which a loss of ten per cent. on the cargo, was occasioned. It was held, that the *deer skins* were not comprehended under the general words of the memorandum, as to articles perishable in their own nature, but under the clause relative to *skins and hides*, and that the insured were, therefore, entitled to recover.

THIS was an action on a policy of insurance on goods, from New Orleans to New York. The vessel, during the voyage, was captured and carried into New Providence, and, after having been detained 56 days, was acquitted. A large quantity of *deer skins*, in bundles, part of the goods insured, were found in a perishable condition, and, after a survey made, a few days before the acquittal of the vessel, it was thought necessary to sell the deer skins, in order to prevent a total loss, in case of their being reshipped; and they were accordingly sold, by which there was a partial loss on the cargo of above ten per cent.

By a *memorandum* at the foot of the policy, it was agreed, "that salt, grain of all kinds, Indian corn, fruits, cheese, dry fish, vegetables and roots, and all articles that are perishable

(a) See Bac. Ab. Sheriff, O. Dalton's Sheriff, 356, *et seq.* *Denson v. Sledge*, 2 Dev. 136. *Joyce v. Williams*, Tayl. 27. *Udall v. Rice*, 1 Tyler, 213. *Prather v. Beebe*, 3 Bibb, 375. *McKeem v. Foster*, id. 48. *Field v. Slaughter*, 1 id. 160. And see United States Digest Supplement, vol. 2, p. 573, *et seq.* *Richmond v. Roberts*, 7 Johns. R. 319. *Burrell v. Acker*, 23 Wend. 606. S. C. 21 id. 605.

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in their own nature, are warranted by the assured, free from average, unless general; and sugar, hemp, flax, flax-seed, bread, *skins, hides* and tobacco, are warranted free from average, under seven per cent. unless general."

A verdict was taken for the plaintiff, subject to the opinion of the court, whether the *deer skins* were within that part of the memorandum, which warrants articles, *perishable in their own nature*, free from average, unless general.

B. Livingston, for the plaintiff.

Troup, for the defendant.

RADCLIFF, J. If the article of deer skins be considered as perishable in its nature, and therefore comprehend- [*247] ed in the first part of the memorandum, and *uncontrolled by the subsequent provision made in it, this case would come within the decision of *Le Roy and others v. Gouverneur*. (1 Johns. Cas. 226.) In that case, we determined, that under the usual terms of the memorandum, the insurer was never liable on account of perishable articles, except for a *general average*, and a *total loss of the commodity*. But the memorandum is here restrained by the subsequent provision, by which the parties have impliedly expressed their sense on the subject. It first declares, that articles perishable in their own nature shall be free from average, *unless general*. It then enumerates certain other articles, and among them *skins* and *hides*; which are warranted free from average, under seven per cent. unless general. To make these provisions consistent, it must be understood that the parties did not consider skins and hides as included in the first description; for otherwise they would be made to say, that for them the insurer should not be liable for any average, unless general; and again, should not be liable for any average under seven per cent. unless general. The latter part of the memorandum must therefore be construed to qualify and restrain the former.(a)

(a) *Ex antecedentibus et consequentibus fit optima interpretatio*, (2 Inst. 317.) 'The law will judge of a deed or other instrument consisting of diverse parts or clauses, by looking at the whole, and will give to each part its proper office, so as to ascertain and carry out the intention of the parties. (Carter, 98.

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I am of opinion that there ought to be judgment for the plaintiff, on the verdict, as it stands.

KENT, J. The only question in this case is, whether the deer skins are to be included in that part of the memorandum, which declares that all articles perishable in their nature are warranted free from average, unless general. By specifying skins and hides as being subject to a partial exemption, the contract has excluded the idea that they are to be considered as goods perishable in their own nature, and subject to a more extensive exception. Any other construction would render the particular enumeration useless and absurd; and as the skins did suffer a partial loss by the *delay arising from the capture, of above seven per [*248] cent., the defendants are responsible for a partial loss.

Hobart, 275. Bro. Max. 249. Shep. Touch. 87. Per Lord Ellenborough, Ch. J. in *Barton v. Fitzgerald*, 15 East, 541. 2 Blac. Comm. 379. *Quackenboss v. Lansing*, 6 Johns. R. 49. *Roberts v. Roberts*, 22 Wend. R. 140. *Proctor v. Poole*, 4 Devereux, 370. *Webster v. Atkinson*, 4 New Hamp. 21. See *Cocheco Manuf. Co. v. Whittier*, 10 id. 305. Per Richardson, Ch. J. *Chamberlain v. Crane*, 1 id. 65. Thus, for example, the condition of a bond may be used to explain the obligatory part thereof. (*Coles v. Hulme*, 8 Barn. & Cresw. 568. *Waugh v. Russell*, 1 Marshall, 214. *Bosworth v. Forard*, Ori. Bridg. 158. *Lloyd v. Lord Say*, 10 Mod. 46. *Langdon v. Goole*, 3 Lev. 21. See also *Uredale v. Halfpenny*, 2 P. Wms. 152. *Ex parte Symonds*, 1 Cox, 200. *Bishop v. Church*, 2 Ves. Senr. 100, 371. *Targas v. Puget*, 2 Ves. 194. *Cholmondeley v. Clinton*, 2 Jac. & Walk. 1;) the general words of a clause may be qualified, or rather explained by matter recited, (2 Saund. 47, t. n. c. *Payler v. Homershaw*, 4 M. & S. 423. See *Simons v. Johnson*, 3 Barn. & Adolph. 180. *Solly v. Forbes*, 2 Brod. & Bing. 38. *Charleton v. Spencer*, 3 Q. B. 633. *Sampson v. Easterly*, 9 Barn. & Cresw. 505. S. C. 1 Cr. & J. 105. See *Den Ex dem Hutton v. Dew*, 3 Murphy, 260. *Woods v. Nashua Manuf. Co.* 5 New Hamp. 467;) and two deeds executed at the same time, and in reference to the same subject matter, will be construed together. (*Jackson v. Dunsbagh*, 1 Johns. Cas. 91. *Starr v. Tift*, 15 Johns. 458. See 2 Cowen, 218. *Watson v. McKinney*, 3 Wend. 233. *King v. King*, 7 Mass. R. 496, 499. *Clap v. Draper*, 4 id. 266. *Holbrook v. Phinney*, id. 596. *Bridge v. Wellington*, 1 id. 219. *Stocking v. Fairchild*, 5 Peck. 181. *Thompson v. McClenachan*, 17 Serg. & Rawle, 110. *Emerson v. Murray*, 4 New Hamp. 171. *Williams v. Handley*, 3 Bibb. 10. *Izard v. Montgomery*, 1 Nott. & McCord, 381.) See generally upon this rule *Marvin v. Stone*, 2 Cowen, 781. *Quackenboss v. Lansing*, 6 Johns. 49. *Watchman v. Crook*, 5 Gill & Johns. 239. *Tabb et al v. Archer*, 3 Hen. & Munf. 399. *Randolph et al. v. Randolph et al. id. Den ex dem. Sasser v. Blythe*, 1 Haywood, 259.)

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LANSING, Ch. J. was of the same opinion.

LEWIS, J. not having heard the argument, gave no opinion.

Judgment for the plaintiff.(b)

ROGET *against* THURSTON.

Where a vessel was insured, excepting French risks, and was captured by a French privateer, and after being detained four days, was recaptured by a British frigate, and condemned, as French property, it was held that the insured could not recover.

The detention, like a deviation for that period, altered the risk, and must therefore be considered as discharging the policy. (Per Radcliff, J.)

If a loss continues total, the assured may at any time abandon, but in the interim he is bound to act with good faith, and take all proper measures to recover and preserve the property insured. (Per Radcliff, J.)

THIS was an action on a policy of insurance, on the cargo of the schooner Venelia, from New York to Port au Prince, *French risks excepted*.

The vessel was captured the 10th July, 1798, by a French privateer, in whose possession she remained until the 14th July, when she was recaptured by a British frigate. She was libelled in the vice-admiralty court of Jamaica, as the property of French subjects. No claim was interposed, and both vessel and cargo were condemned as lawful prize. After the condemnation, the agent for the plaintiff, on the 2d January, 1799, put in a claim and entered an appeal, which was allowed. No notice of the capture, or of the loss claimed, was given by the defendant, until an abandonment was made in October, 1799, which was immediately after receiving authenticated copies of the admiralty proceedings.

It was agreed that if the court should be of opinion that the plaintiff was entitled to recover for a total loss, then a judgment should be entered against the defendant, on a cog-

(b) See Phillips on Insurance, ed. 1840, 481. *Barker v. Ludlow*, *infra*, 289.

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novit actionem, for 507 dollars; *otherwise, a judgment was to be entered for the defendant. [*249]

B. Livingston, for the defendant.

Pendleton and Hamilton, contra.

RADCLIFF, J. delivered the opinion of the court. Three questions have been made in this cause; 1st. Whether the capture by the French, was within the exception of French risks?

Of this, I think there can be no doubt. If we give any effect to the terms of the exception, they must mean that the insurer is not to be liable for any loss by the acts of Frenchmen.

2d. Whether by the French seizure the risks insured against were determined, and the policy discharged?

By this seizure, an event within the exception of French risks happened, and the *casus fœderis*, upon which the insurer was not to be liable, occurred. The voyage was thereby materially interrupted, and the subject placed in a new situation. It cannot be said that the perils were not increased, nor that the subsequent capture was not a consequence, or probably occasioned by the first. It is not material that it should *appear* to be so. It is sufficient that the voyage was interrupted, and the vessel stopped, for at least four days by an event, the risk of which was undertaken by the insured. This detention, like a deviation for that period, altered the risk, and must be considered as discharging the policy.

On this ground, I am of opinion, the plaintiff cannot recover.

3. The third question, as to the time of the abandonment, it would be unnecessary to touch, but it has already been decided, in the case of *Earl v. Lefferts*.(a) *The [*250] right of abandonment was there considered as existing for the benefit of the insured, and to be exercised at his election. In a proper case, he has the right to abandon, but is not compelled to do it. He may take the chance of the ultimate success of the voyage, but he will thereby subject

(a) See *Earl v. Shaw*, 1 Johns. Cas. 313.

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himself to the result of a total or partial loss, according to events. If the loss continues total, he may at any time abandon ; but in the interim, he is bound to act with good faith, and take all proper measures to recover and preserve the property insured. If guilty of any fraud or misconduct, the loss resulting from it would be his own, and the insurer would not be injured.

From this decision it would follow, that if the insured, in the present case had, otherwise, a right to abandon, the abandonment was not too late, while the loss continued total.

But on the former ground, the plaintiff ought not to recover.

LEWIS, J. not having heard the argument, gave no opinion.

Judgment for the defendant.(a)

 ROBERTSON AND BROWN *against* THE UNITED INSURANCE COMPANY.

An insurance on the vessel will not cover a *bottomry* interest, unless it is expressly mentioned in the policy.

Where a bottomry bond executed by the master, after the usual recital and clause hypothecating the vessel for the payment of the money advanced, contained the following clause : " And for the better performance of all the covenants and agreements herein contained, I, the said N. B." (the obligor) " for the consideration aforesaid do *grant, bargain and sell* the said ship, John, and premises to the said G. R." (the obligee) " his executors," &c. with the usual proviso, that on payment, &c., the whole was to be void : it was held, that these words did not destroy the character or operation of the bond.

THIS was an action on a policy of insurance, on the British ship John, from New York to Martinique.

The ship was owned by a British subject residing at Mar-

(a) See 1 Phillips on Insurance, ed. 1840, vol. 1, 697, 699, 731, 732 ; vol. 2, p. 397.

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tinique, and being in New York, and bound to Martinique, *the plaintiffs furnished to the master 10,549 [*251] dollars, for repairs, &c. and took a bottomry bond for the amount. The plaintiffs effected the policy for 10,000 dollars, with a view to secure that sum, as part of their advances for the vessel. The sum was not specified in the policy, as on bottomry. During the voyage the vessel was captured by the French, and the plaintiffs abandoned to the defendants.

The bottomry bond, after the usual recital and clause hypothecating the vessel for the payment of the money, contained the following clause: "And for the better performance of all the covenants and agreements herein contained, I, the said Niel Brown, for the consideration aforesaid, do grant, bargain, and sell the said ship John and premises to the said G. R. his executors, administrators and assigns;" with the usual proviso, that on payment of the money, interest, &c. the whole was to be void.

A verdict was taken for the plaintiff, as for a total loss, subject to the opinion of the court, upon a case containing the above facts, with liberty to either party to turn it into a special verdict.

It was agreed, that if the court should be of opinion that the plaintiffs were entitled to recover for a total loss, judgment was to be entered on the verdict; or if entitled to a return of premium only, then judgment was to be entered for the plaintiff for 1000 dollars; otherwise, a judgment was to be entered for the defendants.

B. Livingston, for the plaintiff.

Troup and Harison, contra.

RADCLIFF, J. 'The bill of bottomry in this instance is not wholly in the usual form. It not only pledges the ship, but, in terms, "grants, bargains and sells" her to the plaintiffs. This additional clause does not, however, appear to me essentially to vary its character or *operation. [*252] It must still be considered as a contract of bottomry. It was made by the captain in his capacity of master, and as such, he could not sell the ship, nor do more than pledge

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her, for the eventual payment of the money. The circumstance, that interest was reserved at seven per cent. only, cannot alter the case. That was a matter of agreement between the parties, and might have been increased or diminished at their pleasure.

Considering the contract as a bottomry only, it created a special interest, which, when insured, must be particularly expressed in the policy. (*Glover v. Black*, 3 Burr. 1394. S. C. 1 Black. Rep. 405.) This has long been determined to be the law and practice of merchants, and no usage appears to counteract it. The instances which have been mentioned, and which accompany this case, are too loose and uncertain to establish a different rule, and ought never to be admitted to overturn a principle so fully and clearly settled.

The plaintiffs, therefore, cannot recover on the policy, but are entitled to a return of the premium, for which no risk has been run by the defendants.

KENT, J. The question is, whether the bottomry interest was covered by the policy, as the bottomry was not specified.

The case of *Glover v. Black*, (3 Burr. 1394,) is decisive upon this point. It was there held that *respondentia* and *bottomry* must be mentioned in the policy, and that this was the law and practice of nations. The risk on a bottomry policy is peculiar. There is neither average nor salvage; (a) and capture does not mean a temporary taking merely, but one that occasions a total loss. If the nature of the interest was not disclosed, the insurer might pay for a total loss on an immediate capture, without being apprised of his rights.

There cannot be any doubt, as to the contract in question being a true bottomry contract. It is agreeable to [*253] the usual form, (1 Beawes, 139,) except as to the additional clause of the sale; and taking contract together, and considering that it was made by the master, it is evident that the sale was only an hypothecation, or mort-

(a) See *infra*, 253, note (b.)

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gage of the ship, which is the just definition of a bottomry contract.

LANSING, Ch. J. was of the same opinion.

LEWIS, J. not having heard the argument, gave no opinion.

Judgment for the plaintiff, for a return of premium.(a)(b)

(a) As to return of premium, see *supra*, vol. i. p. 313, n. (a) to *Delavigne v. United Ins. Co.*

(b) 1. *Definition and nature of the Contract of Bottomry.*] The following definition is given by Mr. Smith, (in his *Mercantile Law*, Am. ed. 1847, p. 421.) "Bottomry is an agreement entered into by the owner of a ship, or his agent, whereby, in consideration of a sum of money advanced for the use of the ship, the borrower undertakes to repay the same with interest, if the ship terminate her voyage successfully, and binds or hypothecates the ship for the performance of his contract. The instrument by which this is effected is sometimes in the shape of a deed poll, and is then called a bottomry bill; sometimes in that of a bond." (See the forms of both, Appendix on Shipping.)

This contract, in many respects, agrees with that of marine insurance. In the one the lender bears the risk, in the other the assurer. In the one the profit, and in the other the premium is the price of the maritime risks, which are supported upon the same principles, and may be made subject to the same modifications. The rate of profit or of premium is greater or less, according to the duration and nature of the risks in the agreement; the property which is the subject of the loan or assurance, is equally exposed to maritime risks, and each contract begins and ends under the same circumstances. In other respects, however, there is a marked difference. In bottomry the lender advances a certain sum—in insurance the assurer advances nothing; on the contrary, he receives a premium. In bottomry things are necessary which may be the subject of a mortgage or pledge; in insurance possible losses are sufficient. The lender upon bottomry contracts no obligation towards the borrower; the assurer binds himself to indemnify the assured against the losses he assumes to the extent of the sum insured. (See 3 Pardessus, ed. 1841, §§ 887—889. See also Alauzet *Traité Général des Assurances*, ed. 1843, vol. 1, p. 490, 494. Also 3 Kent. Comm. 357. *The Draco*, 2 Sumner, 157.) A similar contract was known to the civil laws, *contractus nauticus seu trajectitiæ pecuniæ*, (Dig. lib. 22, Code 4, 33,) which existed where a sum was loaned upon condition, that a loss, during the voyage, either of the money or of the goods bought with it, should be borne by the lender. *Contractus nauticus, seu trajectitiæ pecuniæ, ille est, quo pecunia alicui creditur, hac lege ut, si aut ipsa pecunia, aut merces ex ea comparatæ navigatione perierint, periculum sit creditoris, qui nihil hoc casu recepturus erit.* (Pothier Pand. vol. 8, ed. 1821, p. 254.) Modestinus observes upon this contract—"Trajectitiæ (ea) pecuniæ est, quæ trans mare vehitur: cæterum, si eodem loci consumatur, non erit trajectitiæ. Sed videndum an merces ex ea pecunia comparatæ in ea causa habeantur? (Id est, an contractus pecuniæ trajectitiæ sit, non solum

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quum pecunia creditur, ut ipsa trans mare vehatur; sed et quum pecunia creditur, ut merces ex illa comparandæ trans mare vehantur.) Et interest utrum etiam ipsæ periculo creditoris navigent; (nimirum eo casu quo is qui ad eas comparandas pecuniam accepit pactus est ut pecuniam non redderet, si merces navigatione perirent;) tunc enim *trajectitia pecunia fit.*" (L. 1, Modest. lib. 10, Pandect. et not. Peth.)

This is to be understood (says Pothier, *ut sup.*) that the contract is a maritime loan (*pecuniæ trajectitiæ*) not only when the money is lent which is to be transported beyond sea, but also when it is to purchase merchandizes which is to be exported.

And also that where he, who has borrowed money to buy merchandize, has agreed that he shall not be bound to return it if the goods perish on the voyage. The loan upon bottomry, as by the common law, must appear to have been made by express contract to that effect; for otherwise, the inference was that the borrower intended to suffer the loss. This is stated by Diocletian and Maximian: "*Trajectitiæ quidem pecuniæ, quæ periculo creditoris mutuo datur, casus, antequam ad destinatum locum navis perveniat, ad debitorem non pertinet. Sine hujusmodi vero conventionis, infortunio naufragii debitor non liberabitur.*" (L. 4, cod. h. t. 4, 33.) If, however, such a contract existed, then the risk of the lender attached from the time that it was resolved to sail. Quum autem hujusmodi conventio intervenit: "*In nautica pecunia, ex ea die periculum spectat creditorem, ex quo navem navigare conveniat.*" (L. 3, Modest. lib. 4, regul.)

The lender was only responsible for the perils of navigation and the accidents of the sea. Hence Diocletian and Maximian say: "*Quum proponas te nauticum fœnus ea conditione dedisse, ut post navigium quod in Africam dirigi debitor asseverabat, in Salonitanorum portum nave delata, fœnebris pecunia tibi redderetur; ita ut navigii duntaxat, quod in Africam destinabatur, periculum susceperis: perque vitium debitoris, nec loco quidem navigii servato, illicitis comparatis mercibus, ea quæ navis continebat, fœcum occupasse; amissarum mercium detrimentum, quod non ex mariæ tempestatis discrimine, sed ex præcipiti avaritia et incivili debitoris audacia accidisse asseveratur, ascribi tibi juris publici ratione non permittit.*" (L. 3, cod. h. t. 4, 33.)

The object of the loan upon bottomry is thus stated by Chancellor Kent, (3 Comm. 353.) To procure the necessary supplies for ships which happen to be in distress in foreign ports, where the master and owners are without credit, and in cases in which, if assistance could not be procured by means of such instruments, the vessels and their cargoes must be left to perish. The authority of the master to hypothecate the ship and freight, and even the cargo, in a case of necessity, is indisputable. The vital principle of a bottomry bond is, that it be taken in a case of unprovided necessity, where the owner has no resources or credit for obtaining necessary supplies. (Vide *id.* 171.) The degree of necessity that will justify the master in taking up money on bottomry for repairs, and that will justify the creditor in lending it, is examined with great learning and judgment in the case of the ship *Fortitude*. (C. C. U. S. Mass. August, 1838. See the Law Reporter, vol. i. No. 5. 3 Sumner's R. 228.) Loans upon bottomry made without fraud may as well

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be made at the port of destination as at any foreign port, (3 Kent. Comm. 361; 3 Johns. R. 352,) though not at the owner's place of residence while the means of communication with him are open; for in such a case the reason of the loan fails. (Abbott, 123. Molloy, b. 2, ch. 11, § 11. *Lester v. Baxter*, 2 Str. 695. See the *Rhadamanthe*, 1 Dodson, 201. The *Barbara*, 4 Rob. 1. La Ysabel, 1 Dodson, 273.) The place where the money is loaned, however, does not seem to be material, except so far as it goes to show whether or not there was a necessity for the contract. Thus, in a case of necessity, the master of a ship may hypothecate her, as well at the port of destination as at any other foreign port. (*Read v. Commercial Insurance Company*, 3 Johns. 352.) But he cannot do this in the port from which he first sails. (*Sloan v. Ship A. E. I. Bee*, 250. *Turnbull v. The Enterprise*, Bee, 345.) Nor in any case except one of great distress, and when he has no other means of relief. (*Tunno v. The Mary*, Bee, 120. *Patton v. The Randolph*, Gilpin, 457.) Nor does it seem to be material that the ship is at sea at the time of the loan. In *Conrad v. The Atlantic Insurance Company*, (1 Peters, 386,) the supreme court of the United States decided that it is not necessary that a *respondentia* loan should be made before the departure of the ship on the voyage; nor that the money loaned, should be employed in the outfit of the vessel, or invested in the goods on which the risk is run. It matters not at what time the loan is made, nor upon what goods the risk is taken. If the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming or fraud; if the advance be in good faith, for a maritime premium; it is no objection to it that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage. (See also 4 Wash. C. C. 662. *United States v. Delaware Ins. Co.* id. 418. 2 Emerigon, 382, 385, 386, 401, 481. 1 Valin, 366. 2 Marsh, 747, s. 3 Kent. Comm. 361, 362. See also *The Draco*, 2 Sumn. 157.)

To make a bottomry bond a valid hypothecation of the ship, the obligee must show that the advances were necessary to effect the objects of the voyage, or the safety of the ship. (*Putnam v. The Polly*, Bee, 157. *The Golden Rose*, Bee, 131. *The Aurora*, 1 Wheat. 96. *Hurry v. The John & Alice*, 1 Wash. C. C. 293. *Walden v. Chamberlain*, 3 Wash. C. C. 290. *Crawford v. The William Penn*, 3 Wash. C. C. 484. *Rucher v. Conyngham*, 2 Pet. Adm. 295. *The Mary*, Paine, 671. *Patton v. The Randolph*, Gilpin, 457.) And the bond must be given in a place where the owner has no personal credit, nor any goods of his own, nor of the master. (*Forbes v. The Hannah*, Bee, 348. *Rucher v. Conyngham*, 2 Pet. Adm. 295. *Canizares v. Santissima Trinidad*, Bee, 353. *Turnbull v. The Enterprise*, Bee, 345.)

There is a distinction between the powers of the master and owner in the execution of a bottomry bond. Such an instrument, given by the owner to procure money to buy a cargo, (*The Mary*, Paine, 671,) or to the master to secure wages and advances, (*Miller v. The Rebecca*, Bee, 151,) has been adjudged valid. So if a consignee is directed, by the owner of ship and cargo, to apply the whole proceeds of the cargo to discharge engagements made on the owner's account, he is not bound to apply those proceeds to dis-

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charge expenses of the ship, and may lend his own money to the owner on marine interest. (*The Lavinia v. Barclay*, 1 Wash. C. C. 49.) And in *The Draco*, (2 Sumner, 157,) it was said that where the bond is made by the owner, it is not necessary that the money should be applied to the necessities of the vessel, cargo or voyage. One part owner, however, cannot take from the master a bottomry bond to bind another owner's share for repairs. (*Patton v. The Randolph*, Gilpin, 457.) But the power of the master, is much more limited; his duty is to complete the purposes of the voyage with as little delay as possible, and to save and return the ship; and the power to execute a bottomry bond is only delegated to him for this purpose. He may, therefore, when a voyage is broken up by capture, hypothecate the vessel for money advanced to enable him to bring her home, (*Crawford v. The William Penn*, 3 Wash. C. C. 484,) or to repair and provision her, (*Murray v. Lazarus*, Paine, 572; *Ross v. The Active*, 2 Wash. C. C. 226; *The Packet*, 3 Mason, 255,) or to relieve her from actual arrest on account of debts which are a lien. (*The Aurora*, 1 Wheaton's R. 96.) But the master cannot hypothecate for the mere purpose of paying a pre-existing debt, (*Id.*; see also *Bee*, p. 339,) nor, it is said, if he have on board goods or money of his own. (*Cupesino v. Perez*, 2 Dallas, 195. See *The Packet*, cited above, where the principles applicable to this contract are fully considered.)

In *The Ship Virgin et al. v. Vyfhius*, and *Vyfhius v. The Ship Virgin et al.* (8 Peters, 536,) an objection was taken to the bond, that the supplies and advances might have been obtained on the personal credit of the owners of the ship without an hypothecation. But it was held, that the necessity of the supplies and advances being once made out, it is incumbent upon the owners, who assert that they could have been obtained upon their personal credit, to establish that fact by competent proofs, unless it is apparent from the circumstances of the case. It was also objected, that the supplies and repairs were, in the first instance, made on the personal credit of the master of the ship, and therefore could not be afterwards made a lien on the ship; and held, that the lender on the bottomry bond might well trust the credit of the master as auxiliary to his security; and the fact that the master ordered the supplies and repairs before the bottomry was given, can have no legal effect to defeat the security, if they were ordered by the master, upon the faith, and with the intention that a bottomry bond should be ultimately given to secure the payment of them. In cases of this sort, the bottomry bond is in practice ordinarily given after the whole supplies and repairs have been furnished; for the plain reason that the advances required can rarely be ascertained with exactness until that period. It was also objected, that the advances were for a voyage not authorized by the owners; that the original orders were for the master to get a freight for Baltimore or New York, and if he could not, then to proceed to New Orleans; whereas the master broke up his voyage, and without any freight returned to Baltimore. But the court decided: It may be admitted, that if a bottomry lender, in fraud of the owners, and by connivance with the master for improper purposes, advances his money on a new voyage, not authorized by the instructions of the owner, his bottomry bond may be set aside as invalid. But there is no pre-

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tence to say, that if the master does deviate from his instructions, without any participation or co-operation or fraudulent intent of the bottomry lender, the latter is to lose his security for his advances, bona fide made for the relief of the ship's necessities. (See also *Canizares v. The Santissima Trinidad*, Bee, 361. *Wilmer v. The Smilax*, 2 Peters Adm. 300 n.)

It is no objection to a bottomry bond, that it was taken for a larger amount than that which could be properly the subject of such a loan; for a bottomry bond may be good in part and bad in part; and it will be upheld by courts of admiralty, as a lien to the extent to which it is valid; as such courts, in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity. (*The Ship Virgin*, cited above. See also *The Packet*, 3 Mason, 255.) But where various demands are mixed up in such bond, part only of which will sustain a hypothecation, the obligee must exhibit them to the court in such manner, that they may be separately considered. (*The Aurora*, 1 Wheat. 107.)

A bottomry bond will be void if the vessel be lost through any of the perils assumed by the lender, even though the borrower afterwards obtain a compensation therefor. Thus where money was lent on a *bottomry* bond, conditioned that if the vessel should perform the voyage, the money should be paid in twenty days after her arrival; if she should be lost through perils of the seas, or by fire, or the enemies of the United States, the bond to be void. The vessel was captured by a British cruiser and condemned as lawful prize; upon the appeal, the condemnation was reversed, and full compensation received by the owner, for vessel, cargo, and freight, by virtue of an award of the commissioners under the treaty of November, 1794. It was held that the obligee could not recover in an action of debt brought on the bond. (*Appleton v. Crowninshield*, 3 Mass R. 443.) But in such a case it is said the lender can recover his money in an action for money had and received. (Parker, J. 3 Mass. R. 464; and see per Sewall, J. p. 468 :) "The compensation received by the borrower—the defendant—may comprise a salvage, for which he is accountable to the lender—the plaintiff; but a demand of that nature, if it is recoverable, must be maintained in another form of action." Sedgwick, J. thought the plaintiff might recover in another form of action. (P. 475.)

A valid bond will be upheld, if there be no laches on the part of the lender, even against a bona fide purchaser without notice. (*The Draco*, 2 Sumner, 157.) And where an owner mortgaged his ship, in November, but was permitted to remain in possession and act as absolute owner, and her papers and register were unaltered, and in July following, he gave a bottomry bond abroad, the lender's claim, he having no notice of the mortgage, was preferred to that of the mortgagee. (*The Mary*, Paine, 671.) But though the courts are desirous to protect the rights of the lender in good faith, and to uphold a contract, the effect of which is to promote commerce, yet they require that the lender should regard and enforce those rights in due season, and not sleep upon them; for *vigilantibus non dormientibus succurrant jura*. Thus if the obligee of a bottomry bond permit the ship to make several voyages without asserting his lien, and executions are levied on her, his lien is lost.

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(*Blaine v. The Charles Carter*, 4 Cranch, 328. See also, per Story, J. in *The Aurora*, 1 Wheaton, 104.)

Seamen have a lien prior to that of the holder of a bottomry bond, for their wages; but the owners are also personally liable for such wages; and if the bottomry holder is compelled to discharge that lien, he has a resulting right to compensation over, against the owners; in the same manner as he would have, if they had previously mortgaged the ship. (*The Ship Virgin*, 8 Peters, 538.)

We have seen what risks were assumed by the lender under the civil law, and the common law accords therewith. They are stated by Mr. Phillips, (*Insurance*, vol. 1, p. 734, ed. 1840,) to be "the perils of the seas, captures and all inevitable accidents." Cleirac defines them to be the same usually covered by a policy of insurance, and Valin, the perils of the seas, piracy and captures. (See 1 Phillips on *Insurance*, ed. 1840, p. 734. 3 Kent Comm. 355. Pothier Cont. a la grosse, aventure, n. 1. Emerigon Traité des Contrats, a la grosse, ch. 1, § 2.)

But it is not to be supposed that the lender takes the risk of the bad conduct of the borrower or his agents. (3 Kent Comm. 360. 1 Phill. on Ins. ed. 1840, p. 734. *Western v. Wildy*, Skinner, 152. *Roccus de nav.* n. 51. Code de Comm. art. 326. Ord. de la Mar. tit. Contrats a la grosse, art. 12. Emerigon, tit. 2, 509-512.) The perils of barratry, unseaworthiness, and deviation are not cast upon him by his contract. (3 Kent, 360. Condry's Marshall, 2, 753-758. Boulay Paty, t. 3, 158, et seq.; 171, et seq.; 192. Pardessus, ed. 1841, No. 894.) But if he sees fit to assume any of them in good faith, it is presumed that the maxim, *modus et conventio vincunt legem*, (Rep. 73,) would apply, (see 1 Phill. Ins. 734,) with the limitation, however, that he shall not charge himself with the faults of the borrower: *nulla pactione efficit potest ut dolus præstetur*. (See judgment in *Cullen v. Butler*, 5 M. & S. 466.)

Upon this subject, Pardessus remarks, (vol. 3, ed. 1841, (p. 528,)) "Cette responsabilité peut aussi, comme dans l'assurance, recevoir une extension conventionnelle: ainsi, le prêteur peut se charger de la baraterie de patron; il peut prendre sur lui les risques particuliers attachés à certaines marchandises ou à certaines expéditions, les avaries provenant du vice propre de la chose, les dangers d'un commerce interlope. Dans toutes ces occurrences, la volonté des parties ne reçoit de limites que par les prohibitions de la loi."

Upon the construction of the contract of bottomry, the rule of the French law seems to be that in a doubtful case, the interpretation ought always to be made in favor of the borrower. Upon this question, Pardessus observes:—"Cette distinction, résultant de la différence entre le prêt à la grosse et l'assurance, repose sur ce que, dans le premier, l'emprunteur est le débiteur, et que, dans le doute, il faut prononcer en sa faveur; tandis que dans l'assurance, l'assuré est créancier de l'assureur, pour la réparation de toutes les pertes et dommages qu'il pourra éprouver." (*Droit Commercial*, ed. 1841, No. 895.) The rule of the common law is, however, believed to depend upon different principles, and in this view it is somewhat important whether the contract of bottomry be executed by the borrower alone, or by both parties. In the for-

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mer case, I think the rule "*verba chartarum fortius accipiuntur contra proferentem*," (Co. Litt. 36, a,) would be held to apply as in the case of a deed poll, and that the construction would consequently be in favor of the lender. No sufficient reason is perceived why the ordinary rules of construction should be laid aside in the solution of this contract.

2. *The Risk.*] The sum lent must be at the hazard of the lender during the voyage. Inasmuch as it is, in the language of the civil law, the *pretium periculi*, the danger must be incurred. (Per Lord Tenterden, Ch. J. in *Simonds et al. v. Hodgson*, 3 Barn. & Ad. 50. *Jennings v. Insurance Company of Pennsylvania*, 4 Binney, 244. *The Mary, Paine*, 671. *Rucher v. Conyngham*, 2 Pet. Adm. 295. *Wilmer v. The Smilax*, *id.* note. *Thorndike v. Stone*, 11 Pick. 187.) In *Simonds et al. v. Hodgson*, (*ut sup.*) an instrument executed in a foreign port by the master of a ship, reciting, that his vessel bound to London, had received considerable damage, and that he had borrowed 1077*l.* to defray the expenses of repairing her, proceeded as follows:—"I bind myself, my ship, her apparel, tackle, &c. as well as her freight and cargo, to pay the above sum with 12*l.* per cent. bottomry premium; and I further bind myself, said ship, her freight and cargo, to the payment of that sum, with all charges thereon, in eight days after my arrival at the port of London; and I do hereby make liable the said vessel, her freight and cargo, whether she do or do not arrive at the port of London, in preference to all other debts or claims, declaring that this pledge or bottomry has now, and must have, preference to all other claims and charges until such principal sum, with 12*l.* per cent. bottomry premium, and all charges are duly paid." And it was held, upon error, that this was an instrument of bottomry, for an intention sufficiently appeared from the whole of it, that the lender should take upon himself the peril of the voyage; that the words *my arrival*, must be understood to mean *my ship's arrival*, and that the words, "I make liable the said vessel, her freight and cargo, whether she do or do not arrive at London;" were intended only to give the lenders a claim on the ship, in preference to other claims, in case of the ship's arrival at some other than the destined port, and not to provide for the event of the loss of the ship.

The same rule is stated in the civil law. *Quum dicas te pecuniam ea lege dedisse, ut in sacra urbe tibi restitueretur, nec incertum periculum, quod ex navigatione magis metui solet, ad te pertinuissse profitearis; non est dubium, pecuniæ creditæ ultra licitum modum te usuras exigere non posse.* (L. 2, cod. b. t. 4, 33.) And upon this principle Papinian said: "*Nihil interest, trajectitia pecunia sine periculo creditoris accepta sit, an post diem præstitutum et conditionem impletam periculum esse creditoris desierit. Utrobique igitur majus legitima usura sœnus non debetur. Sed in priore quidem specie, semper; in altera vero, discusso periculo, nec pignora, vel hypothecæ, titulo magoris usuræ tenebuntur.*" (L. 4, Pap. lib. 3, resp.)

But when the principal sum has been put at hazard, even though the contemplated voyage never be performed, the lender is entitled to recover it, together with the profit agreed to be paid. (3 Kent Comm. 357, 358. *Boulay*

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Paty. Cours de Droit Comm. t. 3, p. 174, *et seq.*; 167, *et seq.* See Pardessus, ed. 1841, No. 894.)

3. *The interest.*] The amount of interest upon this contract is only limited by the agreement of the parties. (2 Blacks. Comm. 457. Smith's Mer. Law, 262. 3 Kent Comm. 355.) And this was originally the rule of the civil law because of the risks to which the lender is subjected so long as the vessel is at sea. *Trajectitia pecunia propter periculum creditoris, quandiu navigat navis, infinitas usuras recipere potest.* (Paul. sent. lib. 2, tit. 14, § 3.) But Justinian, by a constitution, limited the interest of this contract to 12 per cent. forbidding it entirely in others. (L. 26, cod. 5, 32, *de usur.*) When, however, the vessel arrives safely in port, no matter how much damaged, (for nothing but an utter annihilation of the subject hypothecated, will discharge the borrower on bottomry; *Thompson v. Royal Exchange Assurance Company*, 1 Maule & Selw. 30; 3 Kent Comm. 359;) the extraordinary interest ceases. (3 Kent. Comm. 362.) This rule also existed in the civil law. *Trajectitium pecuniam, quæ periculo creditoris datur, tandiu liberam esse ab observatione communium usurarum, quandiu navis ad portum appulerit, manifestum est.* (L. 1, cod. h. t. 4, cap. 33.)

It has been made a question what interest is to be charged after the safe arrival of the ship. Pothier and Pardessus, (*Traité du Pret. à la grosse aventure*, 51; Cours de Droit Commer. 2-273,) are of opinion that no interest is chargeable on the profits of the loan after the cessation of the risk; on the contrary, Emerigon, (t. 2, p. 414,) and Boulay Paty, (t. 3, 80-89,) think that legal interest begins upon the principal and profit as an absolute debt as soon as the rule ceases. Chancellor Kent, (3 Commentaries, 362, n. b.) states the rule as laid down by Emerigon, and this is probably to be regarded as the rule in this country. (*The Packet*, 3 Mason, 255.)

4. *As to the liability of the lender to average and salvage.*] Lord Mansfield and Lord Kenyon denied it; (*Joyce v. Williamson*; *Walpole v. Ewer*, Park Ins. 6th ed. 563, 565; and see per Kent, J. in the principal case;) but their position is contrary to the maritime law of France, and of other parts of Europe, and in Louisiana we have a decision against it. (*Chandler v. Garnier*, 18 Martin, 599.) The new French law, contrary to the ordinance of 1681, charges the lender with simple average, on partial losses, unless there be a positive stipulation to the contrary; but such a stipulation, to exempt him from gross or general average, would be void, and contrary to natural equity. (Ord. de la Mar. h. t. art. 16. Code, art. 330. Emerigon, *Traité des Contrats à la grosse*, c. 7, sec. 1.) The reasoning of Emerigon is conclusive in favor of the right of making the lender chargeable with his equitable proportion of an average contribution. If he owes the preservation of his money lent, to the sacrifice made by others for the preservation of the ship and cargo, why should he not contribute towards a jettison, ransom, or composition, made for the common safety? If no such sacrifice had been made, he would have lost his entire loan, by the rapacity of pirates, or the violence of the storm. (3 Kent Com. 359, 360.) By the ordinance of Hamburg, he is not liable to con-

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tribute to general average. (Tit. 9, a. 2; 2 Mag. 225, No. 931.) In France the lender takes the risk of the general average losses, unless the parties expressly stipulate otherwise. (Le Guidon, c. 19 a 5; Cod. de Com. l. 2, a 9, n. 141.) And the law seems to be the same in Denmark. (*Walpole v. Ewer*, Park, 629. 1 Ph. on Ina. 734, 735, *et seq.* See also 3 Steph. N. P. 2203, and Pardessus, ed. 1841, vol. 3, No. 894.) Mr. Phillips observes, (on Ina. 1840, p. 735,) "By saying there is no salvage in bottomry, Lord Mansfield may mean that the lender is not liable to contribute to the expense of saving the property in case of shipwreck, &c. or he more probably means that there is no constructive total loss; for as to the part of the property saved, or the proceeds of it, there seems to be no doubt that it continues to be subject to the hypothecation, (1 Mag. 24, a 24; *Appleton v. Crowningshield*, 3 Mass. Rep. 443; *Wilmer v. The Smilar*, Peter's Adm. Rep. 295, n.; 2 Val. 12; tit. des Cont. a Gorme, a. 18; Cod. de Com. l. 2, tit. 9, n. 142.)

5. *Insurance of lenders' and borrowers' interest.*] It is said that the lender upon bottomry may insure the interest which he has in the contract. (1 Phillips on Insurance, 737.) But in *Thompson v. Royal Exchange Insurance Company*, (1 M. & S. 30; 16 East, 214,) it was decided that an assured on bottomry cannot recover against the underwriter, unless there has been an actual total loss of the ship; for if the ship exist in specie, in the hands of the owners, though under circumstances that would entitle the assured on the ship to abandon, it will prevent its being an utter loss within the meaning of the bottomry bond. Mr. Phillips, in commenting on this case, remarks: (vol. 1, ed. 1840, p. 738:) "The doctrine here assumed, is, that as far as the borrower remains liable to pay the loan, the insurer of the bottomry interest is exonerated. The reasons of this doctrine are not expressed. They may perhaps be derived from the English statute against reinsurance, since to make the insurer liable, while the borrower remained so, would be a guaranty of the borrower's solvency, and accordingly somewhat similar to a reinsurance. But a mortgagee has his claim subsisting against the mortgagor, though the whole mortgaged property is lost, whereas the lender in hypothecation may, by the destruction of the property pledged, lose the sum loaned. The lender, therefore, being exposed to greater risks, has a more complete insurable interest than a mortgagee; and yet a mortgagee, as we have seen, has an insurable interest in the property, and it does not appear by any case or *dictum*, that he may not be insured against the same risks and losses, in respect to which an absolute owner might be insured. Insurance by a mortgagee is again much more similar to reinsurance. It is not apparent why a lender in hypothecation has not an assurable interest to the amount of the loan, in regard to all the risks and losses against which a mortgagee may be insured."

By the law of France, a lender upon bottomry can insure the money lent, though not the expected profits of the loan. (Pothier Contrat. d'Assur. No. 44. Alauzet traité General des Assur. No. 242, *et seq.* Code de Commerce, art. 334, 347. Guidon, Roccus, and Valin, as cited.) The bor-

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rower, however, cannot assure the sum borrowed, (consult the same authorities,) because as he is not compelled to repay it, if the vessel be lost, he does not run the hazard of any loss against which he can claim to be insured (See Alauzet, No. 255.) The reason why the anticipated profits of bottomry loans cannot be assured, are thus stated by Alauzet (No. 255 :) Les considérations qui ont fait proscrire par beaucoup de législations l'assurance du profit maritime des prêts à la grosse sont tout à fait étrangères aux principes du contrat d'assurance, car il est certain que c'est là un profit acquis et soumis aux risques maritimes ; mais on a permis pour ces sortes de prêt de stipuler des intérêts qui dépassent le taux légal ; aucune limite n'a été mise et ne pouvait être mise, puisque les dangers de la navigation auxquels était subordonné le remboursement ne pouvaient être prévus. C'est donc à cause de cette incertitude du paiement, de cette éventualité de la créance que l'on a autorisé cette exagération dans les intérêts. En permettant de faire assurer ce profit maritime, l'incertitude disparaissant, si la différence qui existerait entre la prime payée à l'assureur et le profit stipulé de l'emprunteur dépassait le taux légal, il serait impossible de ne pas reconnaître dans ce profit une usure. On peut se demander, il est vrai, en remontant aux principes que nous venons d'exposer, si l'usure n'existera pas également, même en ne permettant que l'assurance du capital prêté ? Ce n'est pas l'incertitude seule du profit qui en légitime le taux, c'est aussi, et plus même peut-être l'incertitude du remboursement du capital : on change la nature du contrat aussi bien en permettant l'assurance du capital que celle de l'intérêt ; la condition nécessaire pour légitimer le contrat était le danger de perdre le capital. Si le voyage est heureux, le prêteur recevra 30 ou 40 pour cent d'intérêt ; s'il y a naufrage, il ne perdra rien ; ce n'était pas ce que le contrat à la grosse, quand il a été créé, avait voulu établir.

I am not aware of any case, either in the courts of England or America, which decides whether insurance may be made upon anticipated profits of maritime loans. Alauzet (No. 249) observes : Les usages aux Etats-Unis sont favorables à l'assurance du profit maritime des sommes prêtées à la grosse ainsi que du fret ; on peut être certain, en toute circonstance, de trouver les usages des Etats-Unis adopter, lorsqu'il y a contrariété entre les diverses législations, les règles les plus favorables à la liberté illimitée des conventions ; but I have been unable to discover the authority upon which he relies.

Giles v. Bradley.

GILES *against* BRADLEY, Executrix, &c.

A. purchased a negro slave of B. for 200 dollars, for which he gave B. his bill, payable in five months; and it was agreed between the parties, that if A. or his wife did not like the slave, B. would take him back, if he was returned any time within five months, and refund the purchase money; A. offered to return the slave within the five months, and B. refused to take him or to refund the money. A. having paid the bill, brought an action against B. to recover the amount of the purchase-money; and it was held that A. was entitled to recover the amount, as damages for the non-performance of the agreement.

THIS was a special action on the case, brought to recover back the purchase-money of a negro slave, sold by the defendant's testator to the plaintiff. A verdict was found for the plaintiff, subject to the opinion of the court, on the following case.

On the 19th November, 1798, the plaintiff purchased of the defendant's testator a negro slave for 200 dollars, for the payment of which sum the plaintiff executed to the defendant's testator a single bill, payable in five months, with interest; and the bill was afterwards paid by the plaintiff.

At the time of the purchase, it was agreed between the plaintiff and the testator, that if the plaintiff or his wife did not like the boy, the testator would take him back, upon his being returned at any time within five months from the time of the purchase; and that the testator would thereupon refund the purchase money to the plaintiff. *The [*254] plaintiff, not liking the boy, returned him to the testator within five months from the time of the purchase, assigning as a reason that the plaintiff did not like the boy; but the testator refused to receive him, or to refund the purchase money.

Troup, for the plaintiff.

Burr, contra.

RADCLIFF, J. delivered the opinion of the court. This action is well brought. There can be no doubt but that a contract may be so made as to be optional on one of the parties, and obligatory on the other, or obligatory at the election

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of one of them. (Doug. 23, 1 Term Rep. 132, 133. Cowp. 818.) (a) The convenience of parties, in cases like the present, may often require such terms; and there are frequent instances of such agreements being held valid in law. Considering them as valid, I can see nothing in the present case to preclude the plaintiff from a recovery. This is not the case of a written contract. It was wholly by *parol*, and does not come within the rule of evidence concerning written agreements. The single bill was no part of the contract for the purchase, but was made in *pursuance* of it. The purchase was necessarily antecedent, and the execution of the bill a subsequent act, and a part performance of the contract. The bill, therefore, cannot be considered as a writing, which contained the agreement for the purchase. In the case of *Weston v. Downes*, (Doug. 23,) on a similar contract, for the purchase of a pair of horses, the money was actually paid at the time of the purchase, and yet the payment was not considered to affect the plaintiff's right to recover on the agreement. The bill, in the present case, was but a *security* for the payment, and certainly cannot have a greater effect than the payment itself. If the money [*255] had also been paid, I think it might as well be said that the receipt for the payment contained the agreement for the purchase, and should conclude the plaintiff, as that the bill should now conclude him. It would be equally entitled to be considered as the written evidence of the contract.

The subsequent payment of the bill, connected with the circumstance, that the period of five months, at the expiration of which it was made payable, was the same within which the negro was to be returned, might afford the pre-

(a) Thus where A. agreed to deliver to B. by the first of May, from 700 to 1000 barrels of meal, for which B. agreed to pay on delivery, at the rate of six dollars per barrel, and A. delivered 700 barrels, and also before the day tendered to B. 300 barrels more to make up the 1,000 barrels, which B. refused; it was held that B. was bound to receive and pay for the whole 1,000 barrels: the delivery of any quantity between 700 and 1,000 barrels, being at the option of A. only, and for his benefit. (*Disborough et al. v. Neilson et al.* 3 Johns. Cas. 81.)

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sumption that the plaintiff had thereby made his election, and determined the contract. But in answer to this, it is expressly stated, that the testator agreed that the money should be *refunded* on the return of the negro. The agreement to *refund* controls the presumption, and shows that a payment was contemplated as optional in the plaintiff, before the expiration of the five months, which must, of course, have been intended, to be without prejudice to his right of returning the negro.

It has been objected, that as the plaintiff could not, on the ground now taken, have made a defence to an action on the bill, he cannot be permitted, in another action, to recover back the consideration money for which it was given. The principle of this objection, if applicable to the case, is founded on the idea that the present action is brought to recover back the precise and identical sum for which the bill was given. This I apprehend to be altogether a mistake. The object of this action is to obtain damages for the non-performance of the agreement on which it is founded; and those damages may vary, according to the circumstances of the case. They may be more or less than the amount of the bill, and are not controlled or regulated by it. It is not, therefore, the case of a party seeking to recover back money which he was legally bound to pay, and which, in a former action, he could not resist. The plaintiff's right is consistent with the payment or recovery of the bill. In their nature, [*256] they are different demands, and may be essentially different in amount.

I can, therefore, see no ground on which this action ought to be denied. Indeed, it appears to me new and extraordinary, that a single act, (like the present bill,) done in *pursuance* of a contract, should be set up to destroy all the terms of that contract. If the title to this negro had failed, or if his age or any other circumstances were materially different from what was represented and warranted by the testator, as well might it be pretended that this bill would retrospect, and defeat all the previous agreements between the parties. I

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cannot believe it to possess this destructive quality, or ascribe to it such important effects.

We are of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.(a)

(a) Where, by the terms of a contract, it is left in the power of one of the contracting parties to rescind it, and he does so, and money has been received upon the contract, it may be recovered back by an action of *indebitatus assumpsit*. It is only when the contract *remains open* that the plaintiff must state the contract and breach specially. Thus, if A. sell a horse to B., and agree that if the latter dislikes and redelivers the horse to C., C. will repay the money; or otherwise, he will, an action for money had and received lies by B. against A. (3 Lev. 364. Com. Dig. tit. Action of Assumpsit, A. 1.) Thus, in the case of *Towers v. Barrett*, (1 T. R. 133,) which was an action of *indebitatus assumpsit* for money had and received: and on the trial it appeared that the suit was instituted by the plaintiff to recover ten guineas, which he had paid to the defendant for a one horse chaise and harness, on condition to be returned in case the plaintiff's wife should not approve of it, paying 3s. 6d. *per diem* for the hire of it. This contract was made by the defendant's servant, but his master did not object to it at the time. The plaintiff's wife not approving of the chaise, it was sent back at the expiration of three days, and left on the defendant's premises, without any consent on his part to receive it. The hire of 3s. 6d. *per diem* was tendered at the same time, which the defendant refused, as well as to return the money. It was objected, that an *indebitatus assumpsit* for money had and received would not lie; but that the action should have been on the special contract. The court, however, determined that the action for money had and received was maintainable; for the condition was to return the chaise if not approved of; therefore, the moment it was returned, the contract was at an end, and the defendant held the money against conscience, and without consideration. Buller, Just., said, "The distinction between those cases where the contract is open, and where it is not so, is this: if the contract be rescinded, either as in this case, by the original terms of the contract, where no act remains to be done by the defendant himself, or by a subsequent assent of the defendant, the plaintiff is entitled to recover back his whole money; and then an action for money had and received will lie." (See Comyn on Contracts, Am. ed. of 1835, 374, *et seq.* *Stevens v. Lyford*, 7 New Hamp. 360)

Rush v. Cobbett.

RUSH against COBBETT.

In an action of debt on a judgment in the supreme court of Pennsylvania, the defendant pleaded *nil debet* and *payment*. It was held, that the plaintiff was bound to produce and prove the record of the judgment, or an exemplification thereof.

THIS was an action of debt, on a judgment of the supreme court of the state of Pennsylvania. The defendant pleaded *nil debet*, and *payment*. The cause was tried before Mr. Justice Lewis, at the New York circuit, the 27th November, 1800.

At the trial, the counsel for the plaintiff contended, that he was not bound to produce the record of the judgment of the court in Pennsylvania; that the pleas of *nil debet* and *payment*, admitted the record to be, as it had been declared on by the plaintiff, and it was only necessary for him to have the damages assessed by the jury. The defendant's counsel insisted, that it *was incumbent on [*257] the plaintiff, to produce the record, or an exemplification of it.

The judge decided, that the pleas of *nil debet* and *payment* admitted the record as declared upon; and that the plaintiff was not, therefore, bound to produce it; and the jury, under his direction, found a verdict for the plaintiff.

A motion was made to set aside the verdict, and for a new trial, for the misdirection of the judge.

Pendleton and *Riggs*, for the defendant.

B. Livingston, contra.

RADCLIFF, J. delivered the opinion of the court. The question is, whether, under the plea of *nil debet*, the record of the judgment in Pennsylvania, ought to have been proved.

1. If the plea of *nil debet* had any effect or operation, I think it was incumbent on the plaintiff to prove the record.

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It is the general issue, which admits nothing, and is a total and general denial of the plaintiff's right of action.(a)

2. The question whether the plea was proper, arises on the face of the record, and, if improper, it ought to have been answered by demurrer, or not to have been answered at all, and treated as a nullity. By taking issue upon it, the plaintiff has treated it as a regular and competent plea. Having done this, he cannot afterwards consider it as a nullity, and, on that ground, dispense with proof which would otherwise be required. It is unnecessary here to determine, whether *nil debet*, or *nul tiel record*, is the proper plea to an action of debt on a judgment given in another [*258] state.(b) This would demand a consideration of the constitution of the United States, and the act of congress (4th article of the constitution, and act of the 26th May, 1790, Laws of the United States, (vol. 1, p. 115,) relating to the mode of proof, and the effect of such judgment, which present a question of considerable moment. We think it sufficient, to decide the present case, that the plaintiff has admitted the propriety of the plea of *nil debet*, by joining issue

(a) Mr. Starkie observes, (2 Stark. Ev. Am. ed. 1830, p. 463,) " Under the plea of *nil debet*, the plaintiff must prove all the material allegations in his declaration, although the plea be an improper one, to which he might have demurred." A familiar illustration of this principle may be found in an action by the sheriff, or his assignee, on a bail bond, where the plaintiff has inadvertently joined issue upon the plea of *nil debet*, instead of having demurred. Although, under *non est factum*, the plaintiff would only be held to prove the execution in the ordinary way, yet under the former plea he must show the issuing of the writ, the arrest, the execution of the bond, and the assignment, if the action be brought by the assignee. (See 2 Stark. Ev. 139, 140. 2 Phillip's Ev. ed. 1843, p. 166, 168 *Rawlins v. Danvers*, 2 Esp. N. P. C.)

(b) [Old Note.] In the case of *Post and La Rue v. Neafie*, which was an action of debt on a decree of the court of chancery in New Jersey, the defendant pleaded *nul tiel record*; and the court (in January term, 1803,) decided that the plea was improper, and ordered a *repleader* (MS.) (See 1 Caines, 460, 482. 3 Caines, 22, 36. 1 Dal. 188. 2 Dal. 302. Kir. Rep. 119. 1 Wms. Mass. Rep. 401. 3 Term Rep. 733.)

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upon it,(a) and that the question on its merits cannot thus be regularly decided.

New trial granted.(b)

(a) [O'd Note.] See *Meyer v. McClean*, 2 Johns. Rep. 183.

(b) In *Mills v. Duryee*, (7 Cranch, 483,) the question distinctly arose whether *nil debet* is a good plea to an action of debt brought in the courts of the District of Columbia, upon a record of the supreme court of the state of New York; and Mr. Justice Story observed—"The decision of this question depends altogether upon the construction of the constitution and laws of the United States. By the constitution it is declared that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state; and the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof.' By the act of 26th May, 1790, ch. 11, Congress provided for the mode of authenticating the records and judicial proceedings of the state courts, and then further declared that 'the records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken.' It is argued that this act provides only for the admission of such records as evidence, but does not declare the effect of such evidence when admitted. This argument cannot be supported. The act declares that the record duly authenticated shall have such faith and credit as it has in the state court from whence it is taken. If in such court it has the faith and credit of evidence of the highest nature, viz. *record evidence*, it must have the same faith and credit in every other court. Congress have therefore declared the effect of the record by declaring what faith and credit shall be given to it. It remains only then to inquire in every case what is the effect of a judgment in the state where it is rendered. In the present case the defendant had full notice of the suit, for he was arrested and gave bail, and it is beyond all doubt that the judgment of the supreme court of New York was conclusive upon the parties in that state. It must, therefore, be conclusive here also. But it is said that, admitting that the judgment is conclusive, still *nil debet* was a good plea; and *nul tiel record* could not be pleaded, because the record was of another state and could not be inspected or transmitted by *certiorari*. Whatever may be the validity of the plea of *nil debet* after verdict, it cannot be sustained in this case. The pleadings in an action are governed by the dignity of the instrument on which it is founded. If it be a record, conclusive between the parties, it cannot be denied but by the plea of *nul tiel record*; and when Congress gave the effect of a record to the judgment, it gave all the collateral consequences. There is no difficulty in the proof. It may be proved in the manner prescribed by the act, and such proof is of as high a nature as an inspection, by the court, of its own record, or as an exemplification would be in any other court of the same state. Had this judgment been sued in any other court of New York, there is no doubt that *nil debet* would

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have been an inadmissible plea. Yet the same objection might be urged that the record could not be inspected. The law, however, is undoubted that an exemplification would in such case be decisive. The original need not be produced. Another objection is that the act cannot have the effect contended for, because it does not enable the courts of another state to issue executions directly on the original judgment. This objection, if it were valid, would equally apply to every other court of the same state where the judgment was rendered. But it has no foundation. The right of a court to issue execution depends upon its own powers and organization. Its judgments may be complete and perfect, and have full effect, independent of the right to issue execution. Were the construction contended for by the plaintiff in error to prevail, that judgments of the state courts ought to be considered *prima facie* evidence only, this clause in the constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the constitution contemplated a power in Congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision."

This decision was followed in the case of *Hampton v. McConnell*, 3 Wheaton, 234. (See also *Mayhew v. Thatcher*, 6 Wheaton, 129. *Shumway v. Stillman*, 4 Cowen, 292. *Killburn v. Woodworth*, 5 Johnson, 37. *Borden v. Fitch*, 15 id. 121. *Andrews v. Montgomery*, 19 id. 162. *Pauling v. Bud's Ex'rs*, 13 id. 192. *Bates v. Delavan*, 5 Paige, 305. *Wheeler v. Raymond*, 8 Cowen, 311. *Mervin v. Kumbel*, 23 Wendell, 293. *Bradshaw v. Heath*, 13 Wendell, 407. *Starbuck v. Murray*, 5 id. 148. *Shumway v. Stillman*, 6 id. 447. *Thomas v. Robinson*, 3 id. 257. *Wilson v. Niles*, 2 Hall, 358. *Harrod v. Baretto*, 1 id. 155. *Armstrong v. Carson's Ex'rs*, 2 Dallas, 302. *Phelps v. Hother*, 1 id. 261. *Hoxie v. Wright*, 2 Vermont, 263. *St. Albans v. Bush*, 4 Vermont, 58. *Thurber v. Blackbourne*, 1 New Hamp. 242. *Aldrich v. Kinney*, 4 Conn. 380. *Bissell v. Briggs*, 9 Mass. 462. *Hall v. Williams*, 6 Pick. 232. *Curtiss v. Gibbs*, 1 Pennington, 399. *Loring v. Shute*, 2 Southard, 778. *Goodrich v. Jenkins*, 6 Ohio, 44. *Silverlake Bank v. Harding*, 5 Ohio, 576. *Wernwag v. Pauling*, 5 Gill & Johnson, 500. *Miller v. Miller*, 1 Bailey, 242. *Cunningham v. Buckingham*, 1 Ohio, 264. *Spencer v. Brockway*, id. 124. *Earthman v. Jones*, 2 Yerger, 184. *Chippe v. Yancey*, Breese, 2. *Clarke v. Day*, 2 Leigh, 172. 3 Kent's Comm. 261. *Holt v. Alloway*, 2 Blackf. 108. *Evans v. Tatem*, 9 Serg. & Rawle, 252. *Field v. Gibbs*, Peters' C. C. 155. *Greene v. Garmientto*, id. 74. *Bartlett v. Knight*, 1 Mass. 401. *Noble v. Good*, id. 410. *Keeley v. Root*, 11 Pick. 389.)

The judgment of Mr. Justice Story, in *Mills v. Duryee*, however, is to be taken with the qualification that the defendant must have had due notice to appear, or must have actually appeared to the suit, or the judgment of another state will not be deemed of any validity. (See 1 Kent Comm. 261, n. (b) See also per Marcy, J. in *Starbuck v. Murray*, 5 Wend. 156.) That the jurisdiction of the court of another state may be inquired into, see *Thurber v. Blackbourne*, New Hamp. 246. See *Whittier v. Wendell*, 7 id. 257. *Weeks*

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v. Pearson, 5 id. 324. *Benton v. Bergot*, 10 Serg. & Rawle, 240. *Aldrich v. Kenney*, 4 Conn. 280. *Curtis v. Gibbs*, Penn. R. 405. *Boyers v. Coleman*, Hardin, 413. *Killburn v. Woodworth*, 5 Johns. R. 37. *Bissell v. Briggs*, 9 Mass. R. 462. *Mayhew v. Thatcher*, 6 Wheaton, 129.) "It is not," says Chancellor Kent, "to be understood that *nil tiel* record is in all cases the necessary plea, but any special plea may be pleaded which would be good to avoid the judgment in the state where it was pronounced." (1 Comm. 261. *Shumway v. Stillman*, 4 Cowen, 292.)

It was held in *Thurber v. Blackbourne*, (cited *supra*), that *nil debet* was a good plea to debt on a judgment of another state when it did not appear, by the record, that the defendant had notice of the suit, the judgment being a mere nullity, and not affording *prima facie* evidence of a debt. *Nil debet* is also a good plea to an action of debt upon a judgment of a justice rendered in another state. (*Robinson v. Prescott*, 4 New Hamp. 450. *Warren v. Flagg*, 2 Pickering, 448. See *Thomas v. Robinson*, 3 Wendell, 267.) In *Hall v. Barretto*, (1 Hall, 155,) it was held that a special plea in bar of a suit on a judgment in another state to be valid, must deny, by positive documents, every fact which would go to show that the court in another state had jurisdiction of the person or of the subject matter.

WARDELL against EDEN.

Where the plaintiff, after he had assigned a judgment to a third person, and given notice to the defendant of such assignment, entered up satisfaction on the record; it was held, that the entry of the satisfaction was fraudulent and void, and it was ordered to be vacated.(a)

The proper way to try the truth of the allegation of usury, in regard to a

(a) See note (a) to *Andrews v. Bucher*, *supra*, vol. 1, p. 411. The assignment of a judgment divests the assignor of his ownership and control over it. (*Hayden v. Walker*, 5 Alabama, 86. *Harrison v. Marshall*, 6 Porter, 65. *Gale v. Benson*, 3 Alabama, 234.) The assignee may therefore bring a suit, (*Harrison v. Marshall*), or sue out execution, (id.; *Hayden v. Walker*), or collect the money received by an attorney on the judgment, (*Gayle v. Benson*), in the name of the original plaintiff, though he cannot sue on the judgment in his own name. (*Wilson v. McElroy*, 2 Smedes & Marsh. 241.) Payment of a judgment to the assignor before notice, is, upon analogy to the cases cited in the note above referred to, a satisfaction of the debt; but as in the assignment of other debts, the rule is otherwise where notice has been given. (*Laughlin v. Fairbanks*, 8 Min. 367. *Lampson v. Fletcher*, 1 Vermont, 168.)

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judgment, entered upon a bond and warrant of attorney, is to retain the judgment, and award a feigned issue to try the fact: but where the judgment had been assigned to a *bona fide* purchaser, and notice thereof given to the defendant, the court refused to award an issue, considering a judgment as not within the words of the statute against usury, and having reason to suspect a *collusion* between the plaintiff and the defendant, to defeat the claims of the assignee of the judgment.

An application for a feigned issue, is to the sound discretion of the court; and it is awarded only for the information of the court, or where the party is otherwise without relief; and where the defendant alleged payment to the plaintiff, made by him, on a judgment which had been assigned to a third person, the court, on motion for that purpose, refused to award an issue, to try the truth and validity of the payment; but left the party to his remedy by *audita querela*, as the time when the defendant received notice of the assignment was contested; though the court might, if they had thought proper, have stayed execution on the judgment, until it was revived by *scire facias*, or by an action of debt, when the plaintiff might plead the payments.

HARISON, in behalf of the Bank of New York, assignees of the judgment in this cause, at the last term, moved that the rule for vacating the satisfaction entered in this cause, which was granted *de bene esse*, in October term, 1800, (see *ante*, p. 121,) should be made absolute, or that an [*259] issue be directed to try the truth of the facts on which the application was founded. The facts are sufficiently stated in the opinion of the court.

Hamilton, also argued in support of the motion.

Burr, Spencer, Van Vechten and Wortman, contra.

Cur. ad vult.

KENT, J. now delivered the opinion of the court. The material facts in this case are these. A bond, with a warrant of attorney to confess judgment for the sum of 50,000 dollars, was executed by the defendant to the plaintiff on the 20th of June last. Judgment was confessed thereon, and docketed on the 8th July, with a *cessat executio* for six months. The judgment was assigned by the plaintiff, for a valuable consideration, to Nathaniel Olcott, on the 27th of July, and by him to William Roe, on the 1st of August. Considerable payments were made by the defendant to the plaintiff in the month of August. On the 6th of October, the

plaintiff and defendant settled, and the ultimate payment being a balance of 1500 dollars was made. The judgment was assigned by Roe to the bank of New York on the 7th of October. The bank gave notice thereof to the defendant on the 9th of October. Satisfaction was acknowledged by the plaintiff on the 10th, and entered of record on the 11th October. It is alleged on the part of the bank that the defendant had notice, at the time, of the assignment to Olcott, but this notice is denied on the part of the defendant.

Upon these facts, a motion is made in behalf of the bank, that the *vacatur* of the satisfaction which was ordered at the last October term, *de bene esse*, be made absolute; a counter motion is made by the defendant, that the judgment be set aside or that an issue be awarded to try the truth of the allegation, that the bond *was usurious, or, at [*260] at least, to try the validity of the payments made by the defendant to the plaintiff, subsequent to the assignment to Olcott.

1. With respect to the first motion, I am of opinion that the *vacatur* of satisfaction ought to be made absolute. The assignee of the judgment is to be recognized by this court, as the owner, and all acts of the plaintiff subsequent to the assignment, and affecting the validity of the judgment were fraudulent. He has no more power over the judgment than a stranger. But until the defendant has notice of the assignment, all payments made by him, and all acts of the plaintiff in respect to him are good. (See 1 Term Rep. 619. 4 Term Rep. 340. 1 Bos. and Poll. 447, and Andrews and Beeker, see 1 Johns. Cas. 411, July term, 1800.)

In this case, however, the satisfaction was acknowledged and entered after the defendant had notice, and that act is, therefore, void in respect to him, as well as to the purchaser of the judgment. It is proper that the satisfaction should be done away without any terms being imposed as a condition of the *vacatur*, because, in judgment of law, it was an act done in fraud, and against right.

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2. The motion on the part of the defendant is to be considered first in respect to the allegation of usury. If that charge is now to be investigated, yet the judgment ought to stand, in order to preserve the *lien* that it has created upon the land ; and the authorities are clear and decisive, that the proper way to try the question of usury against a judgment entered by confession, is to retain the judgment and award a feigned issue. (Barnes' Cases, 52, 277. Cowp. 737. 1 Bos. and Pull. 270.) But I think the court ought not to aid the plea of usury, under the special circumstances of this case. A *bona fide* purchaser is here the owner of the judgment, and although a bond or note, if usurious, may be void in the hands of a *bona fide* purchaser, because the statute [*261] "makes the instrument itself void ; yet the case is varied in respect to a judgment which is not within the words of the act.

There are also reasons in this case to suspect that this charge of usury is an afterthought, and that there is a collusion between the plaintiff and defendant, to defeat the claims of the bank. The parties carried on negotiations, and effected payments, from time to time, between the first assignment of the judgment and the 6th of October, the one knowing that the judgment was transferred, and therefore acting fraudulently, and the other acting under circumstances that ought to have put him upon inquiry ; and finally, after direct notice to the defendant, they concur in having satisfaction entered to consummate their transactions, and after failing in their efforts at the last October term to render the satisfaction valid, they now unite in setting up this new impediment to the claims of the assignee. Under these circumstances, I think the court ought not to interfere and help the defence.

3. The next object of the application, on the part of the defendants, is for an issue to try the truth and validity of the payments made by the defendant ; and this will depend upon the time at which the defendant is to be considered as having notice of the assignment of the judgment.

The application for a feigned issue is an application to the

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sound discretion of the court. These issues appear, from the cases which I have examined, (1 Wils. 331; Sayer, 253; Barnes, 130; Cowp. 727,) to have been granted only for the information of the court, or where the party was otherwise without relief. In the present case the party has a competent remedy as a matter of right. This is by the writ of *audita querela*, which lies where some matter of discharge has arisen for the defendant subsequent to the judgment. It is true, that in many cases where the defendant might be entitled to his *writ of *audita querela*, the court [*262] will relieve, in a summary way, upon motion. But as Lord Holt observed, (1 Lord Raym. 439, 445; 1 Salk. 264,) if the ground of the application be a release, or other matter of fact, it is reasonable to put the party to his *audita querela*, because the plaintiff may deny it; and if he deny it the court will not relieve upon motion. In the present case, the period of the notice, and, consequently, the validity, as well as truth of the payments, is contested between the parties, and it is proper that these questions should be left to the ordinary mode established for the trial of facts.(b)

(b) An *audita querela* is a writ to be delivered against an unjust judgment or execution, by setting them aside for some injustice of the party that obtained them, which could not be pleaded in bar to the action; for if it could be pleaded, it was the party's own fault; and, therefore, he should not be relieved, that proceedings may not be endless. (Bac. Abr. tit. *Audita Querela*. Com. Dig. *Audita Querela*, A. 3. Blacks. Comm. 405. 2 Saunders' R. 146, a, n. (1) to *Turner v. Davies*.)

The proceeding by *audita querela* is a regular suit, with its usual incidents, issues of law and fact, trial, judgment and error; (*Brooke v. Hunt*, 17 Johns. 484, 486;) and it is said to be in the nature of a bill in equity. (3 Bl. Com. 406. 2 Saund. 148, *ut sup.* *Lovejoy v. Webber*, 10 Mass. 101, 103. *Little v. Newburyport Bank*, 14 id. 443, 446.) It has, therefore been held a proper remedy to compel contribution in favor of one judgment debtor against others whose lands were liable equally with his own. (*Wilson v. Watron*, Peters C. C. 269. See also, per Gold, arg. in *Bank of United States v. Jenkins*, 18 Johns. 305, 307.) Again, it has been called a commission to the judges to examine the cause, (*Ogden v. Rendel*, Cro. Jac. 29,) and the plaint sounds in tort. (2 Saund 148, b. *Little v. Cook*; *Lovejoy v. Webber*; *Brckett v. Winslow*, cited *infra*.) This writ, being a remedial process, "for some injustice of the party," does not lie upon erroneous acts of the court; (*Little v. Cook*, 1 Aik. 363; *Brckett v. Winslow*, 17 Mass. R. 159; *Lovejoy v. Webber*, *ut sup.*; but see *Weed v. Nutting*, Brayt. 26;) for these are either con-

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It is in the power of the court to stay execution upon the judgment, until the same be revived by *scire facias*, or by

clausive or some proceeding in the nature of an appeal will lie. In either case, no remedy by *audita querela* exists; (*Weeks v. Lawrence*, 1 Verm. 433;) even though the writ of error have been taken away by statute. (*Dodge v. Hubbell*, 1 Verm. 491. See *Tuttle v. Burlington*, Brayt. 27.) In *Weed v. Nutting*, (Brayt. 28,) this writ was allowed and judgment and execution set aside when more costs were allowed by a justice of the peace than were warranted by statute. In *Edmondson v. King*, (1 Overt. 425,) it was held, that where greater interest than the law allows had been included in a judgment, this writ would not be granted if the creditor would release the excess. Nor will it lie for matters that "could be pleaded." (*Thatcher v. Gammon*, 12 Mass. 270; *Flint v. Sheldon*, 13 Mass. 453; *Barrett v. Vaughan*, 6 Verm. 243;) but is limited to those which could not, either for want of notice, or because of the fraud or collusion of the other party. (*Johnson v. Harvey*, 4 Mass. 465. *Smock v. Dade*, 5 Rand. 639. See also *Wardell v. Eden*, *supra*, p. 258.) In *Young v. Collet*, it was said that this remedy did not lie where there was any other remedy at law either by plea or otherwise. (See *T. Raym.* 89. 2 Saund. 148, b) This writ is a proper remedy where the debt has been paid either before or after judgment, if the creditor obtains and persists in enforcing judgment in fraud upon the debtor. Thus where a person was sued, and before the return of the writ paid the debt, which the plaintiff received in discharge of the action, yet afterwards fraudulently entered the action and obtained judgment, and caused his execution to be levied on the debtor's property, it was held that the debtor was entitled to an *audita querela*. (*Lovejoy v. Webber*, 10 Mass. 101.) So if one be taken in execution after the judgment has been satisfied, *audita querela* is a proper remedy; though trespass would lie against the creditor: so, if after commitment he pay the judgment, and still be detained by order of the creditor; though he might be relieved by *habeas corpus*. (*Brackett v. Winslow*, 17 Mass. 158.) So if one of two judgment debtors pay the sum due, and the execution is returned unsatisfied with the assent of the creditor, and an alias taken out, on which the other debtor is committed, for the purpose of compelling him to contribute his share of the debt, for the relief of him who made the payment, *audita querela* is the proper remedy. (Id. *S. P. Laddington v. Peck*, 2 Conn. 700.)

Where two suits are brought at the same time, for the same cause of action, and proceed, *peri passu*, to judgment and execution, a satisfaction of either judgment may be shown upon *audita querela*, in discharge of the other. (*Bowen v. Joy*, 9 Johns. 221.) And a party appellant, against whom an affirmation of the judgment has been obtained by the appellee, without notice, and in violation of an agreement to arbitrate the matter, and not carry up the appeal, will be relieved on *audita querela*, though he do not aver in his complaint that he had a good defence to the original action. (*Eddy v. Cochran*, 1 Aik. 359.) And if an execution be sued out on a judgment upon an award, contrary to the manifest intent of the referees, a remedy may be had

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an action of debt, when the defendant would have an opportunity of pleading the payments. But I see no sufficient

in this form. (*Skilling v. Coolidge*, 14 Mass. 48.) So where a judgment creditor caused his execution to be levied on a tract of the debtor's land, in part satisfaction of the execution; but the tract described in the sheriff's return was not shown to the appraisers, nor appraised by them, but a different tract, containing the same quantity, but of less value than that described in the sheriff's return. Held, that the debtor was entitled to relief by *audita querela*; and the levy of the execution was set aside. (*Hurlbut v. Mayo*, 1 Chip. 387.)

A party who obtains a discharge under the insolvent act, after the judgment, may be relieved by this writ. (*Baker v. Judges of Ulster*, 4 Johns. 191. *Petit v. Seaman*, 2 Root, 178.) So where a judgment of a justice of the peace had been obtained without notice, the defendant being out of the state at the time of commencing the suit, and where the plaintiff did not comply with the requisitions of the justices' act. (*Marvin v. Wilkins*, 1 Aik. 107.) And if the sheriff recovers a judgment against a surety, for an escape of a debtor, and the creditor is barred by the statute of limitations of his remedy against the sheriff, the surety may be relieved from the execution by an *audita querela*. (*Hall v. Fitch*, 1 Root, 151.) It is said that where a debtor in Massachusetts, is committed in execution, after the plaintiff's death, this is the suit most proper to bring the question of the legality of such commitment to a decision. (*Commonwealth v. Whitney*, 10 Pick. 439. See also the United States Digest, tit. *Audita Querela*, where the American decisions will be found fully collected.)

The proceeding by *audita querela* is said to have commenced about the tenth year of Edward III.; (*Young v. Collet*, Sir T. Raym. 89; 2 Saund. 148, b.;) but it afterwards gave place, in many instances, to the remedy by motion, which is "more summary, easy and less expensive." In *Sutton v. Bishop*, (4 Burr. 2283, 2286,) the court speak of *audita querela* as an old legal remedy, long disused and expensive; and, indeed, the instances of it in modern times are comparatively rare. It is stated as a general rule that where a writ of *audita querela* clearly affords relief to the defendant, the court will relieve him on motion, without putting him to the *audita querela*. (*Giles v. Nathan*, 5 Taunt. 558. 1 Marsh. 226. *Lister v. Mundell*, 1 B. & P. 427.) But where the relief is questionable, the court will not dispose of the case on motion, but leave the defendant so to proceed that the plaintiff may demur or bring error. (*Id.*) And therefore the court refused to dispose of a writ of *audita querela* by a motion in arrest of judgment, where the parties seriously argued the question. (*Id.*) But where a defendant obtained his discharge too late to plead it, the court relieved him on motion. (*Palmer v. Hutchins*, 1 Cowen's Rep. 42. And where the defendant alleged payment to the plaintiff, made by him, on a judgment which had been assigned to a third person, the court, on motion for that purpose, refused to award an issue, to try the truth and validity of the payment; but left the party to his remedy

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reason why the court should *act* at all in this case more than in any other, so long as the party has the power to act for

by *audita querela*, as the time when the defendant received notice of the assignment was contested; though the court might, if they had thought proper, have stayed execution on the judgment, until it was revived by *scire facias*, or by an action of debt, when the plaintiff might plead the payments. (*Wardell v. Eden*, *infra*, p. 258.)

The court will relieve on motion, instead of putting a party to his *audita querela*, where the case is clear, but not otherwise; and, therefore, where a plaintiff, after he recovered damages in an action of slander, for words imputing felony, was convicted and attainted for felony, and the defendant in the action was a witness against him, the court refused to interfere, by staying all further proceedings in the action, though the crown declined to interfere. (*Symons v. Blaks*, 4 Dowl. P. C. 263. 2 C., M. & R. 416. 1 Gale, 182.) So where if bail, being fixed with the debt, and having paid it, sue the principal and obtain judgment, after a commission of bankruptcy has issued against him, but before he has obtained his certificate; and after he obtained it, the bail in the second action applied to be exonerated, on the ground that the plaintiffs, the bail in the original action, might prove their debt under the commission, by virtue of stat. 49 Geo. III. c. 121, s. 8; the court refused to interfere summarily, but left the bail to their writ of *audita querela*. (*Hewes v. Mott*, and *Dalby v. Same*, 2 Marsh. 37. 6 Taunt. 329. Rose, 455.) And the defendants being bankrupt were sued, and suffered judgment by default in Trinity Term, and final judgment was entered up and execution issued thereon in Michaelmas Term following; on the 13th November, in that term, the defendants obtained their certificate, and on the same day the sheriff's officer levied, and he, notwithstanding a notice that the defendants' certificate had been allowed, being about to sell the goods seized, the defendants paid the amount of the debt and costs into court under a judge's order, to abide the event of a motion. On application by the defendants to have the money paid out to them, the court refused to interfere; but left the parties to their *audita querela*, although it was insisted that by the 6 Geo. IV. c. 16, s. 126, the goods as well as the persons of bankrupts were protected. (*Hanson v. Blakeley*, 1 M. & P. 261. 4 Bing. 493.)

The writ of *audita querela* must be allowed on motion, in open court. It is not, however, of itself, a stay of execution, but may become so, by the order of the court; (2 Johns. Cas. 227;) for which purpose the court will look into the grounds on which it is issued, and if they be such, as would not probably entitle the defendant to the relief he seeks, although they will not refuse the *audita querela*, they will not permit it to operate as a *superedeas* to, or stay the proceedings on the execution, during its pendency. (18 Johns. 5. 2 Duml. 870, 871. Grah. Prac. 2d ed. 451. See also 1 Petersdorff's Abr. 730, 737. Bac. Abr. tit. *Audita Querela*, and the American cases collected by Mr. Bouvill. Com. Dig. same tit. United States Dig. same tit. Serjeant Williams' note to *Turner v. Davies*, 148, a-148, h.)

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himself, and the law has furnished him with adequate means of relief.

We are, therefore, of opinion, that the motion on the part of the assignees of the judgment be granted; and that the motion on the part of the defendant be denied.

Rule accordingly.

***MURRAY and another *against* THE UNITED IN- [*263]
SURANCE COMPANY.**

A capture by a *friend*, or the carrying into port of a neutral, by a belligerent, for adjudication, as contradistinguished from a capture by an enemy, is equally a ground of abandonment by the insured.

Such a capture is *prima facie* evidence of a total loss, and the insured may abandon immediately on receiving intelligence of such capture; and though the vessel may have been restored, at the time of the abandonment, yet if the insured had no knowledge of the fact at the time, it will not affect his right to recover; but a knowledge of the restoration may be presumed, from the lapse of time and distance between the places, in reference to the ordinary course of intelligence.

THIS was an action on a policy of insurance on the cargo of the brig *Essex*. The vessel was captured upon the voyage insured, which was from Charleston to Surinam, and was carried into Demarara, by a British frigate, where she arrived on the 8th of June, and continued with her cargo, in the hands of the captors, until the 18th of June, when the brig and cargo were released without having been libelled.

The master of the brig was consignee of the cargo, and after the release he continued at Demarara, instead of pursuing his voyage to Surinam, until the 2d of September. On the 3d of August the plaintiffs, knowing of the capture but not of the release, abandoned to the defendants. The property insured was *Hamburgh* property. The brig did not belong to, but was hired by the plaintiffs.

B. Livingston and Burr, for the plaintiffs.

Hamilton and Troup, for the defendants.

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KENT, J. Two cases have been decided in this court, which are applicable to the present. The case of *Mumford v. Church*, (see 1 Johns. Cas. 147, 151,) and the case of *Slocum and Burling v. The United Insurance Company*, in October term, 1799. Those cases determined these points.

1. That a taking and carrying into port of neutral property by a belligerent vessel authorized an abandonment. 2. That although restoration was made before, yet if not known until after the abandonment, it did not defeat the [*264] abandonment, *as parties could only act from the state of things as known to them. But the effect of a capture made by a *friend*, as contradistinguished from one made by an *enemy*, was not raised as a question in those cases, but it seemed to be taken for granted that the capture, in either instance, was the same in respect to the right of the insured.

I consider it as well understood and settled, that a capture by a friend is one of the perils insured against. The words of the policy are sufficiently extensive, and parties must be governed by the usual and established meaning of the words unless some law or usage be produced to restrain their operation. In *Goss v. Withers*, (2 Burr. 696,) it was held that the insured might abandon in case of an arrest, or an embargo by a prince not an enemy; and in *Saloucci v. Johnson*, (reported in Park, 79,) the court held the insurer responsible for a capture by a friend. The same construction is given to the policy by the foreign treatises and writers. (Le Guidon, c. 7, s. 1. Valin, tom. 2, 76, 127, 134.) The words, "capture and detention of princes," apply not only to takings by enemies or pirates, but to those made by friends or allies; in one word, to all captures, just or unjust, made by hostility, piracy or otherwise.

The next point is, whether the loss justified the abandonment.

The general rule is, that the insured has a right to abandon immediately upon hearing of a detention, and his claim to indemnity is not suspended by the chance of a future recovery, because, by the abandonment, that chance devolves

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upon the insurer. This rule applies to all cases of foreign detention, whether that detention arise from necessity or in consequence of an embargo, or for the purpose of a judicial inquiry. In either case, the voyage is equally interrupted, and involved in similar uncertainty. Carrying into port denotes strong suspicion; it is good ground to calculate on a serious litigation; *and it is *prima facie* [*265] evidence of total loss. In such cases the English law does not require a delay, in imitation of some foreign rules. The activity of trade rather demands decision and certainty, and that the capital and business of the merchant should not be kept in suspense.

Are there any circumstances to exempt this case from the operation of the rule? Here was not any warranty, or representation, as to the ownership of the property, and in that case the risk of the property, whether it be neutral or enemy's property, is to be borne by the insurer. This is the sense and understanding of the contract with us; and the omission of a warranty or representation leads to the conclusion that the property may not be neutral, and the insurer takes upon himself the risk of loss by capture, *be the property whose it may*. The practice we have gone into, of warranting, or representing the property to be neutral, can have no rational solution but upon this construction; and the same construction prevails in the French law. (1 Emerigon, 460.) And although I think the more natural conclusion would have been, that every person making insurance was to be presumed, even without any warranty, to be the owner of the property insured, unless it was otherwise disclosed and declared; yet the prevailing sense is rather conformable to the language of the policy. The words are, that the insured, "as well in his own name as for and in the name of every person to whom the same doth appertain, in part or in all, maketh assurance;" and it was formerly the practice in England, until prevented by statute, in the year 1785, to effect policies *in blank*, without specifying the names of the persons for whose use the insurance was made.

In the present case, then, there could be no good reason

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for delay. If the property was condemned as enemy's property, the insurer would still have been responsible, [*266] *and there was no reason arising from the pendency of a judicial inquiry, why the abandonment should not have been made, as soon as intelligence of the capture and carrying into port had been received. I say *carrying into port*, for I consider that act so decisive of an interruption of the voyage, and of uncertainty as to the result, that the insured is then authorized to abandon. Whether the insured, in cases of warranty, or representation of neutrality, would be obliged to wait the event of the capture and judicial inquiry, before he abandons, I give no opinion, because such a case is not before the court.

With respect to the act of the consignee, which was noticed upon the argument, I do not consider it as making any alteration in the rights of the plaintiff. It was held, in the case of *Gardiner and others v. Smith*, (1 Johns. Cas. 14,) July term, 1799, that after a total loss, the consignee becomes the agent of the insurer, and his acts enure to the benefit of the insurer, to whom he is amenable for any *mala fides*, in the execution of his trust.

No question was made upon the argument, as to the time of the abandonment. The notice of it was given upwards of six weeks after the restoration of the vessel, but without knowledge of such restoration. It may become a question whether, after a reasonable time, the assured ought not be charged with the knowledge of the restoration. Because of the difficulty of bringing home to the party, in many instances, the knowledge of the fact, the French ordinance of marine, article 39, (2 Valin, 94,) has fixed a precise standard to ascertain the circulation of intelligence, by an arbitrary ratio between the distance and the time. We have no such rule; and the presumption with us must depend upon the time and distance between the places in question, in reference to the ordinary channels, and the ordinary despatch of intelligence.

[*267] *If, however, the presumption would otherwise have arisen against the assured, yet in the present

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case the fact being found that he had no knowledge of the release of the vessel, it repels all such presumption.

Upon every view of this case, I am of opinion that judgment ought to be for the defendant.

LEWIS, J. was of the same opinion.

LANSING, Ch. J. and RADCLIFF, J. not having heard the argument, gave no opinion.

Judgment for the plaintiffs.(a)(b)

JACKSON, *ex dem.* ST. CROIX, *against* SANDS and another.

Where a person, whose real name was Joshua Temple De St. Croix, was convicted and attainted under the act of the 22d October, 1779, by the name of Joshua De St. Croix, it was held, that the proceedings under the act, were to be governed by the rules in cases of attainder, and not by the ordinary course of judicial proceedings; that the conviction in the present case contained an imperfect or incomplete description of the person, which might be supplied and explained by parol proof; and that the identity of the person was a matter of fact, to be ascertained by a jury; *aliter*, if the description of the person be false, or repugnant to the truth.

THIS was an action of ejectment. It was proved at the trial, that the lessor of the plaintiff by the name of Joshua Temple De St. Croix, was seised and possessed of the premises in question, from the year 1766 to 1782, having purchased the property in 1766.

The defendants gave in evidence a record of the convic-

(a) See notes to *Mumford v. Church*, *sup.* vol. 1, p. 151; and *Slocum v. Burling*, *id.*

(b) [Old note.] The same questions, as to capture and abandonment, have since arisen in several courts of the United States, and have been decided in the same manner. See *Duthill v. Galliff*, in the supreme court of Pennsylvania, 1806, Dallas, 446; *Rhineland v. The Insurance Company of Pennsylvania*, in the supreme court of the United States, 1807; 4 Cranch, 29, 46; *Lee v. Boardman*, in the supreme court of Massachusetts, 1807; 3 Tyng's Mass. Rep. 238. See also 4 Tyng's Mass. Rep. 221. But see *Bainbridge v. Neilson*, 10 East, 329. *Church v. Bedient and others*, and *Peyton v. Hallett*, 1 Caines' Cases in Error, 21, 28.

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tion of Joshua De St. Croix, dated the 15th July, [268] *1783, by which it appeared that he had been indicted and attainted, under the act of the 22d October, 1779, called the act of attainder, of adhering to the enemies of the state, and his estate, real and personal, was declared to be forfeited to the people of the state. The defendants also gave in evidence a deed to them from the commissioners of forfeitures, dated the 18th May, 1786, for the premises in question, which stated that they had been "forfeited to the people of the state of New York by the conviction of Joshua T. De St. Croix, late of," &c.

The lessor's name of baptism was proved to be Joshua Temple.

The defendants offered to prove, that the lessor was known, and called by the name of Joshua De St. Croix, as well as by the name of Joshua Temple De St. Croix. The evidence was objected to, but the objection was overruled by the judge. Several witnesses testified that they knew the lessor; that he was generally called Joshua De St. Croix, sometimes Captain St. Croix, or Mr. St. Croix.

The judge left it to the jury to determine on the evidence, whether the lessor of the plaintiff, Joshua De St. Croix, mentioned in the record of conviction, and Joshua T. De St. Croix, named in the deed to the defendants, were not one and the same person; and he directed the jury, if they believed them to be one and the same, to find a verdict for the defendants; reserving for the opinion of the court, the question as to the admissibility of the evidence, and its sufficiency to support the verdict. The jury found a verdict for the defendants.

A motion was made to set aside the verdict, and for a new trial.

Riggs, for the plaintiff.

Troup, contra.

[269] *RADCLIFF, J. In the record of the conviction, the lessor is called Joshua De St. Croix. It is proved on the part of the plaintiff, that his real name of baptism is Joshua Temple De St. Croix, and it is therefore insisted that

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he cannot legally be intended to be the person convicted. The defendants offered proof that he was known by the one name as well as the other; which was objected to by the plaintiff, but admitted by the judge.

The lessor, in the commissioners' deed, is named Joshua T. De St. Croix, and the deed is therefore contended to be at variance with the record of the conviction, and not to be considered as founded on it. But if the variance in the record were fatal, it certainly ought not to be held so in the deed, which is a matter *in pais*, and therefore not subject to the strict rules of legal proceedings. It there appears not as evidence of the person convicted, but as part of the description of the premises intended to be conveyed. This intent, if rendered doubtful or obscure, by a defect or error of description, may be explained and illustrated by proof.

The question, therefore, turns on the variance in the record itself. The act under which the conviction was had, attainted a number of persons by name, and directed a new mode of proceeding to convict and attain others for adhering to the enemies of the state. By this proceeding, a notice of the indictment was to be published by the sheriff, and if the person indicted did not appear, he was of course convicted, and adjudged to suffer the forfeiture of all his property. In this manner the lessor of the plaintiff was convicted, and his property confiscated and sold by the commissioners, under whom the defendants claim.

No doubt every attainder by statute is a high and rigorous act of sovereignty, and can only be defended by the great objects of public safety or national policy. But although highly penal, these, like other legislative acts, are to be construed according to their true intent. The *le- [*270] gislature in this, as in other cases, are not bound by the forms and descriptions of legal proceedings. In bills of attainder, therefore, it is held that great strictness in the name of the person is not necessary. It is sufficient, if the person intended be otherwise well described. The rule, in such cases, is, that an *incomplete* description may be aided by proof, but a *false* or *repugnant* description cannot. Thus,

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in the case reported by Foster, (Fost. 80, 89 ; 1 P. Wms. 612 ; 2 Wooddes, 628,) the attainder of Alexander Lord Forbes, of Pitsligo, by the name of Alexander Lord Pitsligo, was deemed to be an *incomplete*, but not a *false* description, and therefore held to be sufficient. The act now in question, so far as it attains the several persons named in it, is similar to bills of attainder in England, except that its operation is more rigorous, and it does not allow the party to surrender. In other respects, it is an act *sui generis*, and I believe without precedent. Instead of repeating attainders by statute, the legislature provided a substitute by directing a general mode of proceeding against others for the offence of adhering to the enemies of the state. This substitute was evidently intended to have all the effect of statute attainders, and the proceeding under it, I think, ought to receive the same construction. They cannot be placed on the footing of ordinary process, at common law ; for they are professedly a departure from it, and ought, therefore, not to be tested by its rules. The act introduced a new system which was, generally, directed against all persons, and marked with circumstances of as great rigor as immediate attainders by legislative acts. It was intended to be equally conclusive and extensive in its operation ; for it denied the privilege of a writ of error, and even justified the conviction of persons not *in esse* who had been guilty of the offence described in it. These strong measures do not admit of the application of ordinary principles and rules, and indicate a different intent. They can only be resolved into the exercise [*271] of *uncontrolled authority, and be justified only in cases of great public necessity. The intent of the legislature, I think, evidently was, that the persons so convicted should to every purpose be deemed to be attainted, as if they had been *named in the act* ; we are therefore bound to give this conviction the same effect.

This construction is also strongly enforced by the expediency of securing to purchasers the titles fairly acquired under the forfeitures consequent on such convictions. These forfeitures, and all proceedings under them, have been fin-

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ished and executed, and it would be dangerous to suffer them lightly to be called in question. The safety of a numerous class of our citizens, and indeed the peace of the community, requires that they should be at rest.

On the whole, I am of opinion that it was properly submitted to the jury to determine whether Joshua Temple de St. Croix, and Joshua de St. Croix, named in the conviction, and Joshua T. de St. Croix, named in the deed of the commissioners, was one and the same person; and that identity of the person was the only thing necessary to be shown.

KENT, J. In this case the lessor of the plaintiff, whose name is Joshua Temple de St. Croix, was indicted and attainted under the act of the 22d October, 1779, commonly called the act of attainder, for adhering to the enemies of this state, by the name of Joshua de St. Croix, and his estate was sold, in pursuance of the attainder.

The question now is, whether he is precluded from recovering that estate?

In bills of attainder, great strictness in the name of the person attainted is not requisite; a *misnomer*, if it be repugnant to truth, as attainting a person by the name of Thomas, when his true name is Alexander, is fatal. (1 P. Wms. 612. Foster, 81. 2 Wooddes, 628.) But an incomplete "description of the person, as attainting one [*272] by the name of Alexander Lord Pitsligo, when his name is Alexander Lord Forbes, of Pitsligo, is not fatal, because that description, as the judges observed, in the case reported by Foster, 79, 87, though incomplete in point of form, is not repugnant to truth, and the identity of the person, is a mere matter of fact, to be tried in a collateral issue.

Bills of attainder have always been construed, in this respect, with more latitude than ordinary judicial proceedings, for the purpose of giving them more certain effect, and that the intent of the legislature may prevail. They are extraordinary acts of sovereignty, founded on public policy, (Foster, 83, 84,) and the peace of the community; and the quiet of estates require, that purchases held under them should not be shaken. There can be no doubt, but that the rule which

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has been suggested, is the settled rule of interpretation in respect to them.

The point, then, for consideration is, whether the conviction, in the present case, is to be tested by the rules applicable to bills of attainder, or by those applicable to the ordinary course of judicial proceeding.

From a review of the act of attainder, I am inclined to think that the convictions under it are to be considered as analogous to express convictions by bill of attainder, and to require the like construction.

The act was made for the express purpose of working a forfeiture of the estates of the persons who had adhered to the enemies of this state. This appears by its title, by its preamble, and by the strong and summary proceedings which it dictates. A number of persons are, in the first instance, attainted by name, and their estates declared to be forfeited. And then to the end that other offenders may be convicted and attainted, for the like purpose of forfeiture of their estates, it declares it to be lawful for the grand jury of any county to prefer bills of indictment against any person, whether he be then in full life or deceased, who had adhered to the enemies of this state, and owned any real or personal estate within this state. The sheriff of such county was then, upon the indictment being found, to give notice thereof, in one of the public papers of this state, for four weeks, and therein to call upon the person indicted to appear and answer, and upon his default, (and it was declared to be immaterial whether he was then in full life or deceased,) judgment was to be awarded against him, and his estate forfeited.

It was in pursuance of a proceeding of this kind, founded upon this act, that the lessor of the plaintiff, was convicted by the name of Joshua de St. Croix, and the premises in question sold.

This proceeding resembles a conviction by bill of attainder, and has no similitude to the regular and cautious process carried on according to the course of the common law. The notice here given to the accused is analogous to the

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time usually given in acts of attainder, for the person attainted to come in and surrender. (2 Wooddes, 625. Fost. 79.) The legislature also provided by a subsequent statute, that these convictions should not afterwards be reversed or shaken; and this statute being *in pari materia*, may be considered as explanatory of the sense of the other.

By the act of 19th May, 1784, (7 sess. c. 64, s. 23,) it is declared that all forfeitures and confiscations before had against any person, on conviction of adhering to the enemies of this state, are to all intents, constructions, and purposes, ratified and confirmed, notwithstanding any error in the proceedings, or in any wise relating thereto, and all writs of error on any judgment thereon, are declared to be barred.

The conviction of the present lessor of the plaintiff must, therefore, be considered as a conviction under a special provision by statute, and as substantially the same with a conviction by attainder. The conviction cannot *be supported on any other ground; and being [*274] within the same reason, it ought to be guided by the same rules of interpretation.

My opinion, therefore, is, that a conviction of Joshua Temple de St. Croix, by the name of Joshua de St. Croix, is an incomplete description, but not a description repugnant to truth, and that whether the person convicted and the lessor of the plaintiffs were one and the same person, was a question of fact properly submitted, upon the trial, to the jury.

LANSING, Ch. J. and LEWIS, J. were of the same opinion.
Judgment for the defendants.(a)

(a) [Old note.] Though a man may have two or more surnames, he can have but one name of baptism. (Disply v. Sprat, Cro. Eliz. 57. Co. Litt. 3, a. Shep. Touchst. 235. Evans v. King, Willes' Rep. 554. Franklin v. Talmedge, 5 Johns. Rep. 84.)

Johnston v. Hedden.

JOHNSTON *against* HEDDEN.

A declaration on a bond for 70*l.* stating that the plaintiff demanded the 70*l.* of the value of 175 dollars, lawful money of the state, which the defendant owes and detains, is good.

Pounds are not an unknown money of account, and the court will, *ex officio*, take notice of their value.

THIS was an action of debt, on a bond, dated the 12th April, 1796, for 70*l.* The plaintiff, in the declaration, declared the 70*l.* to be of the value of 175 dollars, lawful money of this state, which the defendant owes and detains; and that the defendant bound himself in the said 70*l.*

To this declaration there was a special demurrer, stating that the 70*l.* are not alleged to be of lawful money of this state, nor of any other currency; and the defendant [*275] insists, that in this, like the cases of suits for *foreign money not made current, the declaration must be in the *detinet* only, as if it were bullion.

D. A. Ogden, for the plaintiff.

S. Jones, jun. contra.

Per Curiam. The declaration is sufficient. *Pounds* are not a foreign or unknown money of account. The act requires that all accounts arising from proceeding in the courts of justice within this state, except as to bills of costs, and all *judgments* shall be in dollars, &c. This is not an account or demand arising from proceedings in a court of justice, and, therefore, it was not even necessary to state the value in dollars. The court will, as before, *ex officio*, take notice of the value of *pounds*; and in rendering judgment, convert them into dollars. Besides, the value is here stated, and that is sufficient to direct the judgment.

There must be judgment for the plaintiff.

Judgment for the plaintiff.(a)

(a) See 1 Rev. Stat. of New York, 2d ed. 621.

The People v. Denton.

The PEOPLE *against* DENTON.

The court of sessions has power to discharge a jury, without the consent of the prisoner, in case of an indictment for a misdemeanor; but the power rests in sound discretion, and ought to be exercised with caution.

Where a jury could not agree on a verdict, after being out all night, and part of a day, and the court discharged them, without the consent of the party, the discharge was held to be proper, and the prisoner was again arraigned, on the indictment, for the same offence.

THE prisoner was indicted for a misdemeanor, in neglecting his duty as an inspector of the election of the town of Hempstead, in the county of Queens, in April, 1799, under the act for regulating elections. "The indictment was found at the general sessions of the peace in Queens county. The prisoner pleaded *not guilty*. After hearing the evidence, the jury retired, and came into court in the morning, with a verdict of not guilty; but, on being *polled*, three of the jurors dissented, and, after having been sent out several times, they informed the court that they could not agree, and that there was no prospect of their agreeing on a verdict. The court of sessions, without the consent of the prisoner, discharged the jury; and the indictment was removed to this court by *certiorari*. [276]

The prisoner, being brought up and arraigned, was called on to plead to the indictment.

S. Jones and *C. I. Bogert*, counsel for the prisoner, objected: 1. Because, that the offence stated in the indictment, which is founded on the 21st section of the act for regulating elections, is not an indictable offence, and they moved to quash the indictment. 2. Admitting it be an indictable offence, yet the prisoner, having been once tried, and the jury discharged, without the consent of the prisoner, he cannot be again called upon to answer to the indictment.

In support of the first point, they cited the 20th and 21st sections of the act regulating elections. (See Greenleaf's ed. of Laws, vol. 1, p. 328, 10 sess. c. 15. 2 Hawk. P. C. 301, 302, s. 4. 2 Burr. 799, 803, 804, and Hale's P. C. 171. Cro. Jac. 644.)

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To the second point they cited 2 Hawk. 622, 623, 624. Carth. 465. Foster, 16 to 22, *et seq.* 1 Anderson, 103.

Hoffman, Attorney-General, and *Colden*, District-Attorney, contra, cited, (1.) 2 Stra. 1048. 2 Ld. Raym. 1104. 2 Hawk. 395. (2.) Foster, 27, 29, 30. 2 Hale's P. C. 295, 297. Jacob's Law Dict. *voc.* Jury. 2 Leach, 706.

[*277] **Per Curiam*. 1. This was an indictment for a misdemeanor, and the jury, after being sent out several times, and returned to the bar, could not agree on a verdict, and were discharged by the court, without the consent of the defendant. The power of discharging a jury, in cases of misdemeanors, as in civil cases, rests in sound discretion, and is to be exercised with great caution. Where every reasonable endeavor has been used to obtain a verdict, and it is found that the jury cannot or will not agree, they must *ex necessitate*, be discharged. We think that the discretion of the court below was duly exercised in the present case, and that the discharge was necessary and proper.(a) 2. As to the other point, the court have doubts, and the prisoner must, therefore, plead *instante*. [The prisoner pleaded not guilty, and was recognized to appear at the next *oyer* and *terminer* in Queen's county.](b)

(a) See note (a) to *The People v. Olcott*, *infra*, p. 301.

(b) Though the rest of the judges were not clear, whether this was an indictable offence, Kent, J. thought an indictment would lie. The following is taken from his MS. opinion, as to that point.

The 21st section of the election law, declares, that if any inspector shall wilfully neglect to perform his duty, or be guilty of any corrupt misbehavior, and be thereof convicted, he shall forfeit and pay 200 pounds, to be recovered in a *qui tam* suit, by an action of debt, bill, plaint or information. It is contended, that the statute has created this offence of a wilful neglect of duty by the inspector. This is certainly a mistake. Every wilful neglect of a public trust, affecting the community, is an offence at common law. If the statute had been totally silent as to the whole matter of this 21st section, it cannot be doubted, but that inspectors of the election would have been indictable for a wilful neglect, as well as for a corrupt execution of their office; because, such conduct would be a public injury, and affect the community in its most essential rights. The true distinction on this subject is laid down clearly and emphatically, in *Castle's case*, (Cro. Jac. 644,) and repeated and confirmed by the court of king's bench, in the case of *The King v. Robinson*, (2 Burr. 803.) Where a statute creates a new offence, and inflicts a penalty for the

Murray v. Trustees of Ringwood Company.

*MURRAY, in the matter of the attachment, *against* [*278]
THE TRUSTEES OF THE RINGWOOD COMPANY.

Where the trustees of an absconding debtor, appointed under the act, sold his lands, and gave a deed conveying all the debtor's right and title, and the purchaser was evicted of a part of the land, it was held, that the trustees were not liable to refund any part of the purchase money.

Trustees and persons acting *in auter droit*, are not responsible, unless there be fraud or an express warranty.

AN attachment having issued against certain persons, under the description of the American Iron Company, or Ringwood Company, Peter Goelet, Robert Morris and William Popham, were appointed trustees, pursuant to the act for relief against absconding or absent debtors. The trustees sold all

doing of a thing which was no offence before, and appoints how it shall be recovered, it shall be punished by that means, and not by indictment. But the wilful neglect, as well as the corrupt execution of a public trust, was always a crime by the common law; and weak and miserable would be that system of law, and that administration of justice, which would permit a public officer wilfully to neglect his official duty, and not hold him responsible as for a public offence.

Offences by officers, says Serjeant Hawkins, consist 1st. In breach of duty. In the grant of every office whatsoever, there is this condition implied by common reason, that the grantee ought to execute it diligently and faithfully. Since every office is instituted, not for the sake of the officer, but for the good of some others. Nothing can be more just, than that he who either neglects or refuses to answer the end for which his office was ordained, should give way to others who are able and willing to take care of it. An officer is liable to a forfeiture of his office, for neglecting to attend to his duty, at all reasonable and proper times and places, and also liable to a fine. (1 Hawk. b. 1, c. 66, s. 1, 2.) These positions of Hawkins are cited and confirmed by Sir William Blackstone, (Com. vol. 4, 140,) and leave no doubt but that the offence charged in the indictment in the present case, was an offence at common law.

The indictment here concludes against the statute; but the authorities in 2 Hawk. show that these words may be rejected, as surplusage, if the offence be at common law, and especially, if it be only a common law offence. A case in Strange, 1048, (*Rex v. Luckup*,) goes to show that an indictment will lie on the 21st section of the act, in order for a conviction to found the *qui tam* action. But that case may justly be doubted. Such an indictment is too much an idle prosecution, *pro forma*, and may be founded on the testimony of the man who afterwards sues for his own benefit.

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the right, title and interest of the Company to certain lands at public auction, and three of the lots were conveyed by the trustees to John B. Murray.

An action of ejectment was afterwards brought by Murray and others, who purchased of the trustees, against [*279] persons who claimed title to part of the lands, *and they recovered only 14-18th parts of the land so purchased by them. (See 1 Johns. Cas. 372, 377.) Murray claimed to be refunded 4-18th's of the purchase money paid to the trustees. And,

Pendleton, in his behalf, now moved for an order under the 27th section of the act, to refund 4-18th's of the purchase money, and to pay the costs of the action of ejectment. He cited 2 Eq. Cas. Abr. 688. 1 Ves. 126.

Harison, contra, admitted the power of the court under the act to interfere; but he contended, that in cases of executors, trustees and others, acting *in auter droit*, they can never be liable, unless in cases of fraud, or on an express covenant. That the trustees sold only the right and title of the company, and it was incumbent on the purchaser to look to the goodness of the title. The old maxim of *caveat emptor*, is applicable to them. He cited Doug. 630. 3 Ves. jun. 235.

Per Curiam. It is unnecessary to decide, whether this application is within the 27th section of the act, since we are clearly of opinion that it is unfounded on the merits. The trustees in selling the land, acted *in auter droit*, and the covenants in the deed are expressly confined to their own acts, and do not warrant the title. They merely sold all the right and title of the Ringwood Company, and it was incumbent on the purchaser to look to the goodness of the title. There is neither an express nor an implied warranty on the part of the trustees; and the rule of *caveat emptor* strictly applies. The motion must be denied.

Rule refused.

Cone v. Whitaker.

*GILBERT *against* EDEN AND EDEN. [*280]

Where there is color for the allegation that a bond on which a judgment has been entered up on a warrant of attorney, is usurious, the court will award a feigned issue to try the fact.

WORTMAN, for the defendants, moved to set aside the judgment in this cause, and the warrant of attorney on which it was entered, on the ground of usury. He read several affidavits to prove the usury. He cited 4 Term Rep. 500. 3 Bro. C. C. 603, 604. 2 Ves. jun. 154. Plowd. on Usury, 149.

Hoffman, Attorney General, *B. Livingston* and *Pendleton*, contra.

Hamilton and *Spencer*, for the defendants, replied.

Per Curiam. From the affidavits which have been read, it appears that the bond was usurious; but the court are not to judge of the *credibility* of witnesses. As there is color, at least, for the allegation of usury, the proper course is to award a feigned issue to try the fact. (*Barnes*, 52, 277. *Cowp.* 727. 1 *Bos. & Pull.* 270.) Let a feigned issue be awarded.(a)

CONE *against* WHITAKER.

Where a plaintiff in a cause was nonsuited in 1799, and a judgment of nonsuit entered in January term, 1800, and the plaintiff obtained his discharge under the insolvent act in November, 1800, and the costs of the nonsuit were *taxed*, after the discharge, it was held that the costs were not a debt until *taxation*, and the plaintiff was not therefore discharged from the costs.

THE defendant was nonsuited in a cause, at the October circuit, 1799, and a judgment of nonsuit was entered, in Ja-

(a) 3 *Johns. Rep.* 139, 142, 250. See *Kelly on Usury*, ed. 1835, p. 82; *Ord on Usury*, ed. 1809, p. 95.

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bruary term, 1800, against him as plaintiff. A motion was made, on a case stated, in October term, 1800, to set aside the nonsuit, which was denied. On the 24th November, 1800, Whitaker was discharged, *under the insolvent act, the 14th November, 1800. He was taken afterwards on a *ca. sa.* at the suit of Cone, for the costs of the suit, in which the nonsuit was entered, and which were taxed subsequent to the prisoner's discharge. Whitaker is a nonresident; and if these costs had been added to his debts there would not have been three-fourths of his creditors in amount, to his petition, at the time of his discharge.

Spencer, for the defendant, now moved for his discharge from the execution.

Per Curiam. The costs in this case were not taxed at the time of the defendant's discharge; and being uncertain and unliquidated, they could not be included in his inventory of debts; nor could the present plaintiff recover them until taxed. They cannot, therefore, be affected by his discharge; and the plaintiff, on the principle laid down in *Frost v. Carter*, (a) must be paid. The motion is denied.

Motion denied. (b)

(a) [Old note.] 1 Johns. Cas. 73. The decision in the above case, seems to have been grounded on the rule laid down, by Lord Chancellor Thurlow, in the case *Ex parte Sneaps*, March 4th, 1782, cited in Cooke's Bankrupt Law, (p. 241, 3d ed. c. 6, s. 13,) in which the Chancellor said it was clear, that, in all instances, in the court of chancery, the *taxation* constitutes the demand; and as the *taxation* was subsequent to the bankruptcy, the debt was subsequent, and could not be discharged. (See also 3 Wils. 270, 272.) But there are other cases in which the costs are carried back, by relation, to the verdict or judgment. (*Aylett v. Harford*, 2 H. Bl. Rep. 317. Cooke's B. L. c. 6, s. 10. *Lewis v. Piercy*, 1 H. Bl. 29.) In the case of *Hurst v. Mead*, (5 Term Rep. 365,) it was decided, that if the plaintiff becomes a bankrupt, after he is nonsuited, and before the taxation of costs, the costs of the nonsuit are a debt proveable under the commission. (See also *Philips v. Brown*, 6 Term Rep. 262, and *Watts v. Hart*, 1 Bos. & Pul. 134.) In *Willett v. Pringle*, (5 Bos. & Pull. 190, or 2 Bos. & Pull. N. S.) the court decided, that the costs followed the debt, and that if a bankrupt be sued after his commission, and he afterwards obtain his certificate, he shall be discharged

(b) See *contra*, *Thomas v. Striker*, *infra*, vol. 3, p. 90. *Warne v. Constant*, 5 Johns. R. 335.

***CRAMMOND, Executor, &c. against ROOSEVELT. ['282]**

Where the attorney for the defendant suffered an inquest to be taken by default at the sittings, supposing there was no defence, the court refused to set aside the default, to let the defendant in, to show *usury* as a defence.

S. JONES, jun. for the defendant, moved to set aside an inquest taken by default at the last July circuit in New York, and for leave to plead to the merits. It appeared that the general issue was pleaded and an inquest was taken, of which the defendant's attorney was apprised at the time; but that, through a misunderstanding between him and his client, he did not suppose there was a defence to be made in this suit. The defence was *usury*, which the attorney supposed was to be made in other suits only, in which he was concerned for the same defendant, but which was also applicable to this, and is now intended to be set up.

Jones cited Salk. 513. 1 Wils. 98. 12 Mod. 439. Stiles, 466.

P. A. Jay, contra.

Per Curiam. The defendant has had a full opportunity to make his defence, and the inquest was deliberately suffered to be taken. After this he must be precluded. It would be too loose again to open the cause for a defence, on the ground of a mistake, either in the defendant or in his counsel. Here was no circumvention or deception on the part of the plaintiff, and the defendant can have no legal claim beyond a fair opportunity to make his defence. Public policy and expediency, as well as the danger of [*283]

from the costs as well as the debt. But it is observable, that Lord Eldon, in *Ex parte Hill*, 1801, (cited in a note to *Willett v. Pringle*,) after going through all the authorities, which he examines very critically, decided, that the costs of an action, where the verdict was after the commission, could not be proved, though the debt was proveable. It would seem to follow, that, in his opinion, the bankrupt could not be discharged from the costs which had been taxed, on the verdict obtained prior to the commission. The rule appears, therefore, to be different in the courts of common law, and in chancery. (See Cullen's Bank. Laws, 104, 106, 133, c. 3. s. 2.)

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such a precedent, require that thereafter there shall be an end to litigation.

The motion must be denied.

Motion denied.(a)

MILNER and others *against* GREEN.

Where the principal, against whom a commission of bankruptcy had issued, was arrested on a *ca. sa.* and discharged, it was held, that the *bail* was also discharged, and that there was no necessity to enter an *exoneretur* on the bail-piece.

Whether the court has power to discharge a defendant from execution, on the ground that a commission of bankruptcy had issued against him? *Quere.*

C. I. BOGERT moved that an *exoneretur* be entered on the bail-piece in this cause, or that all proceedings against the bail be discharged. The principal had been declared a bankrupt in Rhode Island, under the law of the United States, and was served with a notice to surrender on the 25th April instant. On the 15th April he was arrested here on a *ca. sa.* and discharged. *Bogert* cited the 22d section of the law. (Laws U. S. vol. 5, p. 45. 6 Cong. 1 sess. c. 19.)

Per Curiam. One of the conditions of the recognizance is, that the defendant shall surrender himself to prison; and when the defendant was arrested by the sheriff on the *ca. sa.* the condition was strictly complied with, and the bail discharged from their responsibility. Where bail are discharged, by the taking of the defendant in execution, it is not usual, nor necessary, to enter an *exoneretur* on the bail-piece. On this ground we deny the motion. The bankrupt law is not to be construed injuriously to bail. It was not made to affect their rights, but those of the plaintiffs; and if the defendant has been discharged in a manner *inconvenient* to the plaintiffs, it results from the bankrupt

(a) See *Graham's Practice*, 294, and cases.

 Seaman v. Haskins.

act, or from the sheriff, who *will be answerable, if [*284]
the act does not authorize a discharge.(a)

Motion denied.(b)

 SEAMAN *against* HASKINS.

After rule for judgment on a demurrer, it is too late to apply, at the next term, for leave to withdraw it.

THERE was a demurrer to the plea, in this cause, which the court, at the last term, decided was not well taken.

(a) [Old note.] In *M'Master v. Kell*, (1 Bos. and Pull. 302,) the court of C. B. in England, decided that they had no power to discharge a defendant out of execution, on the ground that a commission of bankruptcy had been since issued against him by the plaintiff. Eyre, C. J. said there had been no instance of such an application. "Suppose," says he, "the lord chancellor should think fit to supersede the commission, then we shall have discharged the debtor, because a commission has issued against him, and the lord chancellor will have superseded the commission, because the party has been charged in execution."

(b) The discharge of bail is fully considered in Mr. Graham's Practice, 2d ed. 434, *et seq.* He observes: "It has been held by this court that the court will, on motion, discharge an insolvent who has obtained his discharge under the act, since the judgment, without inquiring into the validity or regularity of the discharge. (9 Wendell, 431.) Although, according to the English practice, if the validity of the discharge be disputed, the court will order an issue to try the fact, before they will direct an *exoneretur* to be entered; (2 B. & P. 390; 6 Taunt. 75;) but they will not direct an issue to try those facts, as to which the discharge is rendered conclusive evidence, by statute. (1 B. & Ald. 433.) In England, also, an *exoneretur* has been ordered to be entered on the bail-piece, where the defendant had become a bankrupt, and obtained his certificate in a foreign country, after the contraction of the debt, and it appeared that the plaintiff resided in the same country with him at the time of the bankruptcy; (4 T. R. 185, n.;) but that court refused to do so, in another case, where it appeared that the plaintiff was resident in that country at the time of the defendant's bankruptcy abroad. (8 T. R. 609.) And in a still more recent case, the C. P. in England refused to order an *exoneretur* to be entered, on the ground of the defendant having obtained a certificate of bankruptcy in Ireland, where the bill of exchange on which he was arrested was made payable in England; but directed an issue, to inquire where the cause of action arose. (5 Moore, 331; see 3 Moore, 244. See also note to *Kene et al. v. Ingraham*, *infra*, p. 402.)

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Colden, for the plaintiff, now moved for leave to withdraw the *demurrer*, and reply to the plea. (1 Sellon, 379. Sayer, 316.) No judgment has been entered up.

Riker, contra.

Per Curiam. After the court have given judgment, and ordered it to be entered, and a term has elapsed, the party comes too late to ask for leave to withdraw his *demurrer*. He should have applied at the last term, before the rule for judgment was entered.

Motion denied.(a)

[*285] *FRANKLIN *against* THE UNITED INSURANCE COMPANY.

A commission to examine witnesses will not be granted, so as to stay the proceedings in the cause, unless the party swears positively that he has a good defence on the merits, and that the witnesses named are material.

AN application, in behalf of the defendants, was made, in October term, which was within the time for making the motion for a commission to Porto Bello, in South America; but as the affidavit did not mention the names of the witnesses to be examined, the motion was denied.

Troup, for the defendant, now moved again for a commission. He read the affidavit of the president of the company, stating, that though diligent means were used, the names of the witnesses could not be obtained until after the last term; that the testimony of the four witnesses named was material to prove the condition of the vessel at Porto Bello, the state of the winds, the materials for repairs, and the practicability of the vessel's proceeding to the place of destination; that

(a) See *Andrews v. Beecher*, *supra*, vol. 1, p. 411. *Hildreth v. Harvey*, *infra*, vol. 3, p. 301. *Furman v. Haskins*, 2 Caines, 369. *Currie v. Henry*, 3 Johns. R. 140. *Miller v. Heath*, 7 Cowen, 101. *Boltons v. Lawrence*, 7 Wend. 461. *Patrick v. Conrad*, 3 A. K. Marsh, 612. *Surlott v. Pratt*, id. 174. *Ralston v. Bullitt*, 3 Bibb, 261. *Violet v. Dale*, 1 id. 141. *Hancock v. Vawter*, Hardin, 310.

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the material point in controversy was, whether the vessel might not have continued her voyage, and that this point cannot be ascertained without a knowledge of facts which he believed the witnesses could testify; and that he is advised, and believes, that the defendants cannot safely proceed to trial without their testimony.

It was stated, on the part of the plaintiffs, that there was little trade between the United States and Porto Bello; that two of the witnesses named were also named by the defendants as commissioners, at the October term, and the names of the witnesses were contained in the testimony, brought by the vessel on her return, relative to the vessel and cargo.

Riggs and Hamilton, contra.

Pendleton and Harison replied, in support of the motion.

**Per Curiam.* Though the defendants account [*286] for their delay, in making this application, yet they do not state with certainty that there is a substantial defence; or that they are informed, and believe any to exist. Where a party asks for delay, he ought to state positively that he has a defence on the merits; and that he seeks only the requisite proof. The defendants ask for a commission, for the double purpose of ascertaining or discovering whether a defence really exists, and if it does, to obtain the requisite proof to support it. The affidavit does not state probable grounds to induce a belief that the vessel could have continued her voyage. The commission appears to be intended for general inquiry, to *fish* for facts. If it should be granted, it would become a precedent that would lead to abuse.

The motion must be denied; but the defendants will be at liberty to take out a commission, if they choose, without any stay of proceedings in the case.

Rule refused.(a)

(a) See *Graham's Practice*, 2d ed. 592, 593. See note (b) to *Franklin v. The United Insurance Company*, *supra*, p. 68.

Nitchie v. Smith.

NITCHIE *against* SMITH, Administratrix of SMITH.

Where a judgment by default was regularly obtained against an administratrix, she was allowed to come in and plead, upon showing a sufficient excuse; but the judgment was directed to stand as security for the *assets* remaining after payment of prior judgments confessed, and for *assets quando acciderint*.

C. I. BOGERT, for the defendant, moved to set aside a judgment by default, on *scire facias*, entered at the last term. The defendant's affidavit stated that she had a good defence, and that, during the time for pleading, her attorney was dangerously ill, she herself residing in Connecticut.

Hamilton, contra, contended that the judgment, at least, ought to stand as security for the assets.

[*287] **Per Curiam*. The defendant ought not to be made liable beyond the assets remaining in her hands, after satisfying the other judgments which she confessed. Not having sufficient to discharge all the judgments, she was obliged to give some a preference. Her election in favor of other creditors, therefore, is not to be charged to any misapplication of the assets; and she ought not to be made liable for more than what remains, after satisfying those judgments. Her excuse, too, for not pleading, appears sufficient; but as the judgment is regular, it ought to stand as security for the assets in her hands, beyond the amount of the other judgments, and for other assets *quando acciderint*; and she must disclose, by affidavit, the state of the assets at the time, and since.

Rule accordingly.(a)

(a) See *Russel v. Ball*, *infra*, vol. 3, p. 92. *McKinstry v. Edward*, *supra*, p. 113, and n. (d)

Haskins v. Snowden.

HASKINS *against* SNOWDEN.

Where the defendant gives notice of bail, in *propria persona*, and the plaintiff serves him with a copy of the declaration and notice of rule to plead, and the defendant afterwards retains an attorney, the plaintiff need not serve another copy of the declaration and notice on the attorney.

S. JONES, jun. moved to set aside the default entered in this cause, for want of a plea, on the ground of irregularity.

It appeared that Malcolm had given notice of being concerned as attorney for the defendant ; but no copy of the declaration, or notice of the rule to plead, had been served on him. The plaintiff, having previously received a notice of bail being filed, from the defendant in person, served the copy of the declaration and notice on him, before receiving any notice of the retainer from Malcolm.

Riker, contra.

**Per Curiam.* After receiving notice of bail from [*288] the defendant, in *propria persona*, it was regular to serve the copy of the declaration on him ; and the plaintiff was not bound to deliver a new copy and notice to the attorney who was afterwards retained. But as the defendant has made affidavit that he has a good defence on the merits, and no trial has been lost, the default is set aside, on payment of costs.

Rule granted.(a)

(a) See, to the same point, *Kleecke v. Styles*, 3 Johnson, 250.

CASES
ADJUDGED IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW YORK,
IN JULY TERM, IN THE YEAR 1861.

BAKER *against* LUDLOW.

Where "*dried fish*," were enumerated among the articles in the memorandum to a policy of insurance, as free from average, unless general; as also, "all other articles perishable in their own nature;" it was held, that *pickled fish* were not included in the memorandum, and that the plaintiff might recover for an average loss on them.

THIS was an action on a policy of insurance, on *goods*, from North Carolina to Martinique. At the foot of the policy, was the following memorandum: "It is agreed, that salt, grain of all kinds, Indian meal, fruits, cheese, *dried fish*, vegetables and roots, and all other articles *perishable in their own nature*, are warranted by the assured, free from average, unless general."

The cargo consisted of *pickled fish*, peas and other articles. During the voyage, the vessel sprung a leak, and the peas, which were *in bulk*, became so much damaged and heated as to spoil the fish. The fish were herrings pickled in North Carolina under the direction of sworn inspectors, and were in good order when the vessel sailed.

At the trial, three witnesses on the part of the plaintiff were of opinion that pickled fish was not a perishable article within the meaning of the memorandum

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[*290] *in the policy; and one of them said that the memorandum had been altered within a few years to dry fish, so as to exclude pickled fish. Two witnesses for the defendant said they thought pickled fish, particularly *herrings*, a perishable article within the memorandum.

The jury found a verdict for the plaintiff, for a partial loss.

A motion was made to set aside the verdict, and for a new trial.

Pendleton, for the defendant.

Troup and Boyd, for the plaintiff.

Per Curiam. By the terms of the *memorandum*, fish in general were not intended to be included; and the expression *dried fish* implies that other fish were not intended; for *expressio unius exclusio est alterius*.(a) The subsequent words, "all other articles perishable in their own nature," are not applicable to the articles previously enumerated, nor can they repel the implication arising from the enumeration of them. The weight of evidence is also in favor of this construction, as being that in which the sense of the words is generally understood. We are, therefore, of opinion that the plaintiff must have judgment.

Judgment for the plaintiff.(b)

[*291] *BUTTERWORTH *against* STAGG.

Where a person brought a suit in the name of another, without his privity or consent, it was held to be a contempt of the court, and the nominal plaintiff being nonsuited, an attachment was granted against the person who brought the suit, for the costs.

THIS was an action of *assumpsit*, on a promissory note, brought by Richard M. Woodhull, in the name of Butter-

(a) See Co. Litt. (Coventry's read. ed.) 210, (a.); Bro. Max. 278, 286, where many cases are cited.

(b) Upon the construction of policies of insurance, see 1 Phillips on Insurance, 43, *et seq.*; 1 Duer on Ins. 158, *et seq.*

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worth, the present plaintiff. It appeared that Butterworth never was either the payee or holder of the note, nor in any way interested therein; and that Woodhull never had any authority to bring the suit in his name, and that the plaintiff knew nothing of the suit.

The plaintiff was nonsuited at the last circuit.

Baldwin now moved for a rule on Woodhull, to show cause why an attachment should not issue against him for the costs, on the ground of a contempt of the process of the court.

Per Curiam. This is evidently an abuse of the process of the court. It is a contempt to bring a *fictitious* suit, or to use the name of another, without his privity or consent. If we do not interfere, the nominal plaintiff may be materially injured; and when it is in our power to afford him relief, in this summary mode, as for a contempt, we ought to do it, and reach the real person who has perverted the process of the court. We therefore grant the rule. (*Core v. Phillips*, Cas. temp. Hardw. 237. 4 Bl. Com. 285.)

Rule granted.(a)

*GILBERT *against* FIELD.

[*292]

Where the plaintiff does not declare within the time required by the statute, the defendant cannot enter a judgment of *non pros.* without having previously entered a rule for the plaintiff to declare, and served him with a notice of such rule.

THIS was an action for *slander*. The plaintiff not having declared within two terms, the defendant entered his default in the book of common rules, and afterwards entered a judgment of *non pros* thereon, without a rule or notice to declare.

(a) See 2 Revised Statutes of New York, 534, § 1. Graham's Practice, 2d ed. 691.

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Riggs, for the plaintiff, now moved to set aside the judgment for irregularity.

Spencer, contra.

Per Curiam. The statute directs, generally, that if the plaintiff does not declare before the end of two terms, the defendant shall be entitled to a judgment of *non pros*; but the time and manner of declaring, and of entering the judgment of *non pros*, is left to be governed by the rules and practice of the court. The 7th, 8th, and 9th rules of April term, 1796, require, in all cases, whether the defendant enters his appearance, or files common or special bail, that a *rule* to declare must be entered, and *notice* thereof given to the plaintiff, or his attorney, before a judgment of nonsuit can be entered. As no such rule has been entered, or notice given, the judgment must be set aside.

Rule granted.(a)

[*293]

*RENOARD *against* NOBLE.

In an action of *scire facias*, against bail, the defendant pleaded that another person of the same name and description became bail, and traversed that he was the person named in the bail-piece. The name of Elnathan Noble was inserted in the bail-piece, but it was proved that Stephen Norton was the person who intended to be bail, and who, in fact, appeared before the judge who took and signed the acknowledgment on the bail-piece. It was held, that the plea was good; that the evidence was admissible, and sufficient, on the issue joined between the parties, as to the identity of the person.

Where bail are personated, the court will, in their discretion, on motion, order a *vacatur* of the bail.

But if there has been a felonious personating of bail, they will stay any order for relief, until the party personated has prosecuted the felon. *Per Kent, J.*

THIS was an action of *scire facias*, on recognizance of bail, in which the defendant is described as "Elnathan No-

(a) See *Graham's Practice*, 2d ed. p. 191, 622. *Id.* 3d ed. vol. 1, 587, and n. (4.)

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ble, of the town of Pittsfield, yeoman." The defendant pleaded, that another person of the same name and description became bail, and traversed that the defendant is the same person. The plaintiff replied that the defendant and the person described in the recognizance of bail are the same person, and issue was joined thereon.

At the trial of this cause, the defendant admitted his name and addition to be, as stated in the recognizance of bail, and that there was no other person of that name and addition in the town where the defendant resided, to his knowledge.

The defendant then proved that the defendant in the original suit employed an attorney, who, in the autumn of 1798, made out a bail-piece, as of the term of October, 1798, which the original defendant took, and went out with his bail, and returned on the same day with the bail-piece, certified by a judge, and in company with one Stephen Norton. The attorney did not recollect the bail, whether he was the present defendant or the said Stephen Norton; but it appeared that the name of the bail, in the bail-piece, was in the handwriting of the attorney, and that Norton resided in a different town from that in which the defendant resided. The bail-piece was dated the 11th January, 1798. It further appeared, by the testimony of Stephen Norton, that he came to Cooperstown (where the judge who took the bail resided) to be special bail for the defendant in the original suit. The original defendant went to the attorney to get the bail-piece drawn, and then he and Norton went together to the judge, who signed his name to the *bail-piece, but [*294] did not ask Norton to acknowledge himself bail, and no words passed between him and the judge. This was on the 11th January, 1798; and the present defendant was not in Cooperstown on that or the preceding day. Norton supposed himself bail, till after a trial in the original suit, and the original defendant had gone off. A verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the above facts; and two questions were raised for the consideration of the court.

1. Was the evidence admissible?

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2. If so, was it sufficient to establish the plea?

Emott, for the plaintiff.

Hoffman, Attorney-General, contra.

KENT, J. delivered the opinion of the court. It was admitted by the plaintiff's counsel, at the argument, that in case bail are personated, the court could direct a *vacatur* of the bail; and this appears to have been done in a variety of cases. (Cotton's case, Cro. Jac. 256. *Higham v. Barfold*, 3 Keb. 694. Beasley's case, T. Jones, 64.) The power of awarding a *vacatur* is exercised by the court in great discretion. They refuse it where, upon examination, the merits of the cause do not appear sufficiently clear; (1 Ld. Raym. 445; 12 Mod. 257;) and sometimes stay it until the person personated has prosecuted to effect the person guilty of wilfully personating him, as was done in Beasley's case. (T. Jones, 64.)(a)

All the cases that have been cited are instances of application to the discretion of the court. There are [*295] none *of a plea avoiding the record. But the form of the plea in the present case is taken from Lilly's Ent. 398, a book of generally approved precedents; and it does not appear to be repugnant to the rule, that no averment shall be admitted against a record. The plea does not contradict a single fact in the bail-piece. It only avers that the defendant is not the person of that name, thereby intended, which is an averment consistent with the truth of the record. But the validity of the plea is not to be examined in this way, for the plaintiff admits its validity, in point of law, by traversing the fact; and the parties go to trial upon the issue, whether the defendant is or is not the same person mentioned and described in the bail-piece.

To this issue the evidence offered was competent and pertinent; and the only remaining question arising on the case is in respect to its sufficiency.

(a) See *Hobhouse v. Hamilton*, (1 Scoles and Lefroy, 207,) in which it was held that an enrolment of a deed binds, though procured by fraud; and that it is better to let the party seek his remedy for the fraud, than question the record.

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Here, also, I cannot entertain any doubt. The defendant most certainly was not the person who appeared and became special bail. It appears from the testimony of Stephen Norton, that he was himself the person who appeared before the judge, when the acknowledgment of bail was certified; that he, *bona fide*, intended to be the bail, and supposed he was bail.

This is not the case, therefore of a felonious personating of bail, in which the courts have required, when application has been made to their discretion for relief, a previous prosecution of the felon. But it may be said that the whole plea is not verified, to wit, that there was another person of the same name and description, who became bail; and that the proof, as far as it goes, is, that there was no other person of that name and description. In answer to this objection, I consider the allegation, that another person of the same name became bail, as but one inducement to the substance, or *gist* of the plea, which is, that the defendant was not that person. The proof that there was no other person, is but merely negative. *It could not be requisite for [*296] the defendant to prove such a fact; and if he proves himself not to be that person, the law will intend, in conformity with the plea, and in consistency with the truth of the record, that another person of the same name and description does exist.

In the case of Charles Ratcliffe, (Foster, 41,) who was brought into court for judgment, in the year 1746, upon a conviction and attainder had in the year 1716; he pleaded that he was not the person mentioned in the record, and issue was joined on that single fact, without its being incumbent on the defendant to question or identify any other person. No doubt was entertained but that if the plea had been true in fact, it would have been valid in law.

We are, therefore, of opinion that the defendant is entitled to judgment.

Judgment for the defendant.(a)

(a) See Graham's Practice, 2d ed. 433, *et seq.*; 818, *et seq.*

Gilfert v. Hallet and Bowne.

GILFERT against HALLET and BOWNE.

Insurance on goods, at and from New York to Barracoa, with liberty to touch at one or two ports on the north side of Cuba; the adventure to continue until the goods are safely landed at Barracoa, and one or two ports on the north side of Cuba. The vessel arrived at Barracoa the 26th June, and staid there until the 30th October, 1799, without being able to sell the cargo, except a small part, and without selling any of the goods of the insured; and the vessel was forcibly entered by pirates, who carried away 4,780 dollars, in cash, and a great quantity of goods. The vessel set sail for the Havana, but was compelled by stress of weather and want of provisions to go to New Providence, where she arrived the 15th December, where the goods remaining were sold for 3,701 dollars (the invoice amount of the cargo being about 16,500 dollars) and the voyage broken up, and an abandonment made, as for a total loss. It was held, that the stay at Barracoa did not amount to a *deviation*; that the breaking bulk at Barracoa, did not put an end to the voyage there, and that the breaking up the voyage at New Providence was justifiable, and a sufficient ground of abandonment, so as to entitle the plaintiff to recover for a total loss.

THIS was an action on a policy of insurance, dated 23d May, 1799, on goods, on board the sloop *Two Friends*, "at, and from New York to Barracoa, with liberty to touch at one or two ports on the north side of Cuba." 'The adventure was to "continue until the goods *were safely landed at Barracoa, and one or two ports on the north side of Cuba." The premium was twelve and a half per cent., to return two and a half per cent. if the voyage ended at Barracoa.

The vessel sailed from New York on the voyage insured the 2d June, 1799, and arrived at Barracoa on the 8th June, and on the 21st October proceeded to Quibera, and arrived off the harbour on the 23d; when the supercargo went on shore to go to a town about thirty miles from the harbour, and the sloop was, in the mean time, to be kept off and on the harbour. On the 26th, the sloop run into the harbour, in consequence of a signal; but which proved to be that of pirates, who came on board and by force took possession of and plundered the vessel. They took away 4780 dollars in cash, and a great quantity of goods. On the same day the

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supercargo returned, and finding the pirates on board, went on shore on the 28th to procure an armed force, which, however, arrived too late. The pirates left the sloop on the 30th October, and on the 1st November, she set sail for the Havana, by what was deemed the safest course. In consequence of high winds and a heavy sea, the sloop lost three main shrouds, between the 6th November and the 14th December, one sailor died, and the sloop wanted hands and necessaries; and the crew being worn out by fatigue, they bore away on that day for Nassau, where they arrived on the 16th December. The sloop had continued at Barracoa, with endeavors, on the part of the supercargo to sell his cargo, but he could only dispose of a small parcel from each invoice, except the plaintiff's, of which he sold none. Several persons had adventures on board. There were nearly twenty American vessels at Barracoa, which staid nearly as long as the Two Friends. The plaintiff's goods were carried to New Providence, and there sold with the cargo that remained. The invoice amount of the whole cargo was about 16,500 dollars, and the net proceeds of the whole sold at Nassau *was 3701 dollars and 31 cents. An [*298] abandonment was made on the 17th March, 1800.

On these facts, the jury, under the direction of the judge, found a verdict for the plaintiff, as for a total loss.

A motion was made to set aside the verdict, and for a new trial.

Pendleton and Harison, for the defendants.

B. Livingston and Troup, contra.

The counsel for the defendants contended, that the risk ended by breaking bulk at Barracoa, or, at least, that the long stay at Barracoa, nearly four months, was unnecessary and amounted to a deviation; and that staying three days off the harbor of Quibera was also unnecessary, and a deviation; for the liberty granted in the declaration to touch, was only for information and not for trade; and lastly, that the vessel might easily have been repaired at New Providence, and gone on, the plaintiff not having lost any of his property.

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KENT, J. delivered the opinion of the court. Staying an unusual and unnecessary time at a port will amount to a deviation; (Park, 295;) but I cannot say that this was the case with the vessel in question at Barracoa.^(a) The object of the voyage to that place was the sale of the cargo, and the supercargo made endeavors, but to no purpose, to effect a sale. From the facts found, we cannot now intend any unreasonable delay or negligence, on the part of the assured, at Barracoa. We are to consider the supercargo as having tried, from week to week, to sell the cargo, even by [*299] retailing it in small parcels; and that *his long stay there was not singular nor probably unusual, since about twenty sail of American vessels tarried there nearly as long as the sloop Two Friends.

Nor do I consider that the breaking bulk at Barracoa put an end to the voyage or terminated the risk.^(b) In respect to the plaintiff's cargo, there was no breaking bulk. But what takes this case out of those that have been cited, (Park, 4th ed. 206; *Still v. Wendell*, 6 Term Rep. 531; Millar, 126,) is the special stipulation in the policy, that the adventure was to continue until the goods were safely landed at Barracoa, and one or two ports on the north side of Cuba.

It was evidently the intention of the parties to make this a trading voyage, and that the vessel might go from Barracoa to one or two ports on the north side of Cuba, disposing of the cargo by retail, as the vessel proceeded, within the prescribed course. If the breaking bulk at one port was to put an end to the risk, the language of the policy would have been different. It would have been expressed that the adventure was to continue until the goods were landed at Barracoa, or other port of discharge on the north side of Cuba. This is probably not an unusual provision in our policies of insurance, for in the cause of *Smith v. Bates and Waterbury*, which was on a policy to a market in the West Indies,

(a) [Old note.] See *Earl v. Shaw*, 1 Johns. Cas. 313. *Smith v. Surridge*, 4 Esp. N. P. Rep. 25; and *Suydam and another v. Marine Insurance Company* 2 Johns. Rep. 138.

(b) [Old note.] See *Rain v. Bell*, 9 East's Rep. 195.

and which was tried at the New York circuit, in 1795 ; it was shown to be the mercantile usage and sense on the subject, that on a policy to a market, the vessel might go from island to island until the whole of the cargo was sold, without being chargeable with a deviation.(a)

The other stipulation in the policy to return two and a half per cent. if the voyage ended at Barracoa, confirms the opinion that Barracoa was not understood to be, at all events, the *terminus* of the voyage, and the liberty to touch, which, had it stood naked and unexplained in the policy, could not have extended to a liberty *to break bulk, [*300] must mean leave to trade, and that too subsequent in the order of time to the arrival at Barracoa.

I see nothing, therefore, either in the stay or in breaking bulk, to prevent the plaintiff from recovering. Nor did the stay of three days before and off the harbor of Quibera, amount to a deviation. It was not an unreasonable delay or deviation, in seeking for a market, considering the nature and circumstances of that coast, and the character of the natives.

So while the vessel was on her way to the Havanna, the departure to the island of Nassau arose from necessity ; from adverse weather which weakened the vessel, exhausted the necessaries of life, and the strength and competency of the crew.

The only question then is this, was the voyage broken up, so as to justify an abandonment on the arrival of the vessel at New Providence ? The whole cargo of the vessel amounted originally to 16,000 dollars ; and only a small parcel, probably not amounting to a third of the cargo, was sold at Barracoa. A great quantity of goods and 4780 dollars in cash were lost by the act of the pirates, so that the net amount of the whole cargo remaining, when the vessel arrived at Providence, did not exceed 3701 dollars. Considering the vessel was injured and the necessaries exhausted, owing to the state of the winds and sea, and the cargo so greatly diminish-

(a) [Old note.] See *Maxwell v. Robinson and another*, 1 Johns. Rep. 333.

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ed by the piracy, I think the voyage may be deemed to have been broken up, and not worth pursuing. The expense of pursuing it, would have exceeded the benefit arising from it. (2 Burr. Rep. 1269. 1 Term Rep. 615.) The remains of the cargo could not justify the re-equipment of the vessel, and a continuance of the voyage; and the jury were warranted in finding a total loss.

We are, therefore, of opinion that the motion be denied.

Rule refused.(a)

[*301]

*THE PEOPLE *against* OLCOTT.

A. and B. were indicted for a conspiracy to defraud C. B. was acquitted, and the jury being unable to agree on a verdict whether A. was guilty or not, the court, against the consent of A., ordered a juror to be withdrawn, and the jury discharged. It was held that the court may, in their discretion, in a criminal case, discharge a jury who are unable to agree on a verdict, and against the consent of the defendant, who may be brought to trial a second time for the same offence.

Whether the court can discharge a jury in a capital case on the ground that they cannot agree. *Que.* Per *Kent, J.*

Where three persons were engaged in a conspiracy, and one of them died before trial, and another was acquitted, it was held that the survivor might be tried and convicted.

A. and B. being indicted for a conspiracy to defraud C., the jury found a verdict that there was an agreement between A. and B. to obtain money from C., but with an intent to return it again; this was held not to be a verdict of acquittal, or a verdict on which any judgment could be given.

THE prisoner being brought into this court by *habeas corpus*, a motion was made that he should be discharged upon the following statement of facts.

The prisoner and Henry Aborn were indicted at the New York *oyer* and *terminer*, in November last, for that they and Solomon Roe had *conspired* to defraud the Bank of New York of money. Roe was dead when the indictment was

(a) See the note to *Patrick v. Ludlow*, *infra*, vol. 3, p. 10.

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found. The prisoner and Aborn were brought to trial at the same court, and the latter acquitted ; and with respect to Olcott, the jury, after having remained out a long time, to wit, from about 8 o'clock on Saturday evening till near 2 o'clock the next day ; and, coming into court two or three times for information and advice, agreed on the following verdict :— "That there was an agreement between Roe and the prisoner to obtain money from the Bank of New York, but with intent to return it again." This verdict the court considered as imperfect, and refused to receive it. The court then asked the jury if there was any prospect of their agreeing on a general verdict of guilty or not guilty, and the foremen said, "No." They were then asked if they could agree to find a special verdict, stating the procuring the money from the bank, in the manner stated in the indictment, except as to the intent therein charged, to defraud the bank, and leave that intent, as an inference of law, to the court ; and the foreman said, "No." They were then asked whether they would agree to a special verdict, finding the conspiring as charged, excepting the intent to defraud, &c., and with this additional fact, that they intended to return the money again ; and the foreman answered *again in the [302] negative ; whereupon the court, without the consent of the prisoner, ordered a juror to withdraw, and the rest being called, and only eleven answering, they were discharged.

The counsel for the prisoner contended that he ought to be discharged, on three grounds.

1. Because the prisoner, being once put on his trial, and the jury not being able to agree on a perfect verdict, and being discharged by the court against the consent of the prisoner, he cannot be again brought to trial.

2. Because the conviction of two persons is requisite to constitute the crime of conspiracy, and Aborn being acquitted, and Roe being dead, the prisoner cannot legally be convicted.

3. Because the verdict offered was a competent verdict of acquittal, and ought to have been received.

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Riggs and *B. Livingston*, for the prisoner.

Hoffman, Attorney-General, contra.

KENT, J. delivered the opinion of the court. 1. The first point arose, and was decided by this court, at the last term, in the case of *The People v. Denton*; (see ante, 275;) but, as the same question has been raised and argued by counsel in this cause, it was evidently with a view that the court should reconsider its former decision. This has accordingly led me to give the subject a further and more attentive consideration; and my researches and reflections have terminated in the following result.

Lord Coke (1 Inst. 227, b. 3 Inst. 110,) lays it down as a general rule, that a jury sworn, and charged by the court, in cases of life or member, and so in all cases of felony, cannot be discharged by the court, or any other, but they [*303] ought to give a verdict. The only *authority, however, that he cites in favor of this general position, is a case from 21 Edw. III. 18, (Foster, 32; Brooke's Corone, 42,) in which it was adjudged that a person indicted for larceny, and who had pleaded not guilty, and put himself upon his country, should not, afterwards, when the jury was in court, be admitted to become an *approver*; because, by solemnly denying the fact by his plea, he had lost all credit, and ought not to be received as a witness against others. (Foster, 32, 33. Brooke's Corone, 42.) This authority, cited by Lord Coke, does not warrant, or add the least sanction to his general rule, and the authority itself was afterwards overruled; and the court used to exercise its discretion, in sometimes refusing, and sometimes admitting persons to the liberty of approving, after the jury were sworn, and evidence in part given. (Foster, 33, 34.) The same doctrine advanced by Coke, was afterwards engrafted by Serjeant Hawkins, (P. C. b. 2, c. 97, s. 1,) and by Mr. Justice Blackstone, (Com. vol. 4, p. 360,) into their elementary treatises on the criminal law; but their opinions rest solely upon the foundation of Lord Coke's authority. There is also a note in Carth. 455, in which it is stated to have been a resolution of all the judges of England, of which Ch. J. Holt was then

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one, that, in capital cases, a juror cannot be withdrawn, even with the prisoner's consent, nor in any case, civil or criminal, without it.(a)

With respect to the note in *Carthew*, it underwent a critical examination, in the case of the two *Kinlochs*, (*Foster*, 27, 28,) in the year 1746, and it was considered as a palpable mistake of the reporter. The case, as corrected by a MS. report of Ch. J. Eyre, was on an indictment for perjury; and on the trial, the prosecutor finding his evidence defective, insisted on withdrawing a juror, and Ch. J. Holt refused it, saying, that in criminal cases, a juror cannot be withdrawn, but by "consent; and in capital [*304] cases, not even with consent. This case, therefore, goes only in restraint of what was properly deemed an unreasonable and oppressive claim on the part of the prosecutor.

In the case of *The King v. Jeffs*, (*Stra.* 984,) Lord Hardwicke followed this example of Holt. He refused, in a case of barratry, to permit a juror to be withdrawn, on the motion of the prosecutor, after he had gone into proof, and found himself deficient, because the punishment annexed to that offence might be infamous; but he said it might be, and had been done, in other cases of misdemeanors. This, like the preceding case, controls an improper exercise of the power of the court, but does not deny its existence. It perhaps admits too much; for to allow the prosecutor, in any case, to withdraw a juror, because he finds himself not fully prepared in his proofs, is an unreasonable indulgence, unless it should be made to appear, that some part of the testimony was wanting, through the contrivance or agency of the defendant.

It seems, then, that the position, generally denying the power of the court to discharge a jury sworn and charged in a criminal case, has originated (probably without further examination or inquiry) from a *dictum*, to be found in the

(a) In civil actions, the justices, upon cause, may discharge the jury. (*Bra. Inq.* 39, 47, 63, &c. cited in 1 *Tri. per Pais*, 259.)

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institutes of Lord Coke, and that this *dictum* rests upon his single authority, without the sanction of any judicial decision. None of the decisions go any further, than to prescribe a rule to the discretion of the court in particular cases. On the contrary, there are many authorities admitting and establishing the power of the court to discharge the jury, even in capital cases.

In the case of *Ferrars*, cited in Sir T. Raym. 84, which was on an information for forgery, it is said to have been held by all the justices, that after a jury was sworn and charged in a capital case, they may be dismissed, or a juror withdrawn, though this was said to be contrary to [*305] common tradition. Again, *on a trial for larceny, reported in 1 Vent. (p. 69,) after the jury were sworn, as the witnesses did not appear, and were suspected to have been tampered with by the defendant, the jury were discharged, and the trial put off; and Sir John Strange produced the record of a case of *Hill*, 8, s. 7, (*Foster*, 271,) where, on an indictment for murder, the jury delivered a verdict handed to them by the prisoner, and they were in consequence of it discharged and committed, and the defendant tried again. In the spirit of these decisions, Sir John Holt (*Salk*. 646,) admitted that even a new trial might be granted in criminal cases, if the verdict was obtained by fraud or trick; and Sir M. Hale, (*P. C.* vol. 2, p. 295,) in direct opposition to Coke, says, that the practice had, in his time, become ordinary for the court, after the jury were sworn and charged, and evidence given, if it appeared that some of the testimony was kept back, or that there might be a fuller discovery, and the offence as notorious as murder or burglary, to discharge the jury, and remit the prisoner for another trial.

In the case of the two *Kinlocks*, (*Foster*, 22 to 40,) to which I have already alluded, the single point decided was, that the court might, in a capital case, on motion of the prisoner's counsel, and at his request, and with the consent of the attorney-general, before evidence given, discharge the jury, to let in a new defence, which the prisoner could not

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otherwise have; but the general question, touching the power of the court to discharge jurors, underwent a full and solemn discussion, and all the cases that I have mentioned, were cited and examined. Ten of the English judges gave their opinions *seriatim*, and according to the elaborate and able argument of Sir M. Foster, which he has preserved entire, and which we may consider as the opinion of all the judges, except one, as all but one agreed in the same principles and result, the court came to this *decision; that the general rule, as laid down by Lord Coke, had no authority to warrant it, and could not be universally binding. That the question was not capable of being determined by any general rule, for that none could govern the discretion of the court, in all possible cases and circumstances, and that the case in Carthew was of little or no weight, and must have arisen from a mistake in the reporter. Sir M. Foster stated several exceptions to the general rule of Coke, and said that many more might be mentioned. Among other instances, he admitted the right of the court to discharge the jury after evidence given, because the indictment did not suit the case, and had been mistaken by the prosecutor; and this power is also recognized in several of the books. (Comb. 401. Kelynge, 26, 52.) He further admitted the right of the court, in the cases stated from Ventris and Hale, where practices had been used to keep the witnesses out of the way; though he reprobated, and very justly, the extent to which it had been carried, in other instances, where the evidence was not sufficient to convict. (St. Tr. vol. 2, p. 710, 827.)

The instances in which the court has exercised its discretion in discharging the jury, have multiplied since the time of Foster, and have now become very considerable in point of number and importance. If a prisoner be found to be insane, (1 Hale, 35,) or in a fit, (Leach, 443,) or be taken in labor, (Foster, 76,) or if a juror escape from his fellows and go off, (2 Hale, 296,) or be taken in a fit, or be intoxicated; in all these cases it has been ruled, that the court may discharge the jury, and remand the prisoner for another trial.

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The general rule, as laid down by Coke, and most of the cases on the subject relate to trials for capital offences, and even there we have seen how far the rule has been justly questioned, if not wholly done away ; and the many exceptions which are conceded to exist against its universality. But the case now before the *court is a case of misdemeanor only, and the precise question is, whether, in such case, it does not rest in the discretion of the court to discharge the jury, whenever they deem it requisite to a just and impartial trial. It is worthy of notice, that there is no general rule, nor any adjudged case, denying this power in the court, in the case of a misdemeanor. The resolution of Holt, as it appears in its correct and authentic state in Foster, and the decision of Lord Hardwicke, only go to restrict the undue exercise of this power, on trials for misdemeanors, by denying to the prosecutor the liberty of having a juror withdrawn, because he happens, after entering into his testimony, to find himself unprepared through his own default ; and even this extraordinary indulgence is granted, according to Hardwicke, if the punishment annexed to the offence be not infamous.

If the question in capital cases be doubtful, there is nothing to render it so in cases of misdemeanor. The power of the court in those cases is analogous to their power in civil cases ; and they seem, in many respects, to possess the same control over the verdict, in exercising the power of awarding new trials, (6 Term Rep. 688 ; T. Jones, 163 ; 1 Lev. 9 ; 21 Vin. 478 ; Loft. 147 ; 4 Bl. Com. 355 ; Ridg. 51 ; 1 Lev. 9,) and taking a privy verdict ; (T. Raym. 193 ;) and the party is also entitled to a writ of error, as a matter of right. (Laws of New York, vol. 1, 184.)

I conclude, then, that as no general rule or decision that I have met with, exists to the contrary, in a case of misdemeanor ; and as the rule, even in capital cases, abounds with exceptions, and is even questioned, if not denied by the most respectable authority, that of nine of the judges of England, it must, from the reason and necessity of the thing, belong to the court, on trials for misdemeanors, to discharge the jury

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whenever the circumstances of the case render such interference essential to the furtherance of justice. It is not for me here to say, *whether the same power exists in the same degree, (for to a certain degree it must inevitably exist,) on trials for capital crimes, because such a case is not the one before the court; and I choose to confine my opinion strictly to the facts before me. [*308]

With respect to misdemeanors, we may, with perfect safety and propriety, adopt the language of Sir M. Foster, (p. 29,) which he, however, applies even to capital crimes; "that it is impossible to fix upon any single rule which can be made to govern the infinite variety of cases that may come under the general question touching the power of the court to discharge juries sworn and charged in criminal cases." If the court are satisfied that the jury have made long and unavailing efforts to agree; that they are so far exhausted, as to be incapable of further discussion and deliberation, this becomes a case of necessity, and requires an interference. All the authorities admit, that when any juror becomes mentally disabled, by sickness or intoxication, it is proper to discharge the jury; and whether the mental inability be produced by sickness, fatigue, or incurable prejudice, the application of the principle must be the same. So it is admitted to be proper to discharge the jury when there is good reason to conclude the witnesses are kept away, or the jury tampered with, by means of the parties. Every question of this kind must rest with the court, under all the particular or peculiar circumstances of the case. There is no alternative; either the court must determine when it is requisite to discharge, or the rule must be inflexible, that after the jury are once sworn and charged, no other jury can, in any event, be sworn and charged in the same cause. The moment cases of necessity are admitted to form exceptions, that moment a door is opened to the discretion of the court, to judge of that necessity, and to determine what combination of circumstances will create one.

*There is an opinion given, in an ancient book, [*309] of approved authority, (The Doctor and Student,

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dial. 2, c. 52,) which comes up fully to the case before the court. In answer to the 5th question of the Doctor, whether it stand with conscience to prohibit a jury meat and drink till they be agreed, the learned author (St. Germain) puts this answer into the mouth of the Student, "that if the case happen that the jury can in no wise agree in their verdict, and that appears to the justices, by examination, the justices may, in that case, suffer them to have both meat and drink for a time, to see whether they will agree; and if they will in no wise agree, I think (continues the Student) that the justices may take such order in the matter as may seem to them, by their discretion, to stand with reason and conscience, by the awarding of a new inquest, and by setting a fine upon them, that they shall find in default, or otherwise, as they shall think best, by their discretion; like as they may do if one of the jury die before verdict, or if any other like casualties fall in that behalf."

This power in the court, so far from impairing the goodness or safety of trial by jury, must add to its permanence and value. The doctrine of compelling a jury to unanimity, by the pains of hunger and fatigue, so that the verdict, in fact, be founded not on temperate discussion and clear conviction, but on strength of body, is a monstrous doctrine, that does not, as St. Germain evidently hints, stand with conscience, but is altogether repugnant to a sense of humanity and justice.^(a) A verdict of acquittal or conviction obtained under such circumstances, can never receive the sanction of public opinion. And the practice of former times, of sending the jury, in carts from one *assise* to another, is [*310] "properly controlled by the improved manners and sentiments of the present day.

So a verdict, obtained unfairly, by secret and artful, or bold and direct influence over the jury, by the parties, their friends, or bystanders, would, if admitted to be recorded, be

(a) Mr. Elwyne, in his preface to the State Trials, (p. 6, 7,) exposes, in strong terms, the injustice and absurdity of starving a jury into unanimity in criminal cases.

a disgrace to the administration of justice. The power of discharging a jury, in these and other instances which might be enumerated, is a very salutary power, and calculated to preserve that mode of trial in its purity and vigor.

In the present case, I cannot say the discretion of the court was unduly exercised. The jury had been out a long time, and had repeatedly come into court and received its information and advice. They at last returned a verdict, which, for the present, I will assume to be an imperfect one, on which no judgment could be given. They refused to give any other verdict, either general or special. In short, the jury, after being out from Saturday evening till the afternoon of the succeeding day, return and declare, they cannot agree to give any legal verdict. The circumstances constituting a case proper for the discharge of a jury, must be more accurately perceived and more justly felt by the court before whom the trial is had, than by any other court. It must, therefore, be a pretty clear case of an abuse of discretion, to induce me to say the court below ought not to have discharged the jury.

I am, therefore, of opinion, on the first point, that the defendant ought not to be discharged.

2. The second ground on which the motion was made, is, that the conviction of two persons is requisite to constitute the crime of conspiracy; and Aborn being acquitted, and Roe being dead, the defendant cannot legally be convicted.

But the case of *The King v. Nicolls*, (Stra. 1227,) is directly in point, that one conspirator may be convicted after the other is dead, before conviction. This was "a determination by the court of K. B. and a subse- [*311] quent case of *The King v. Scott and Hames*, (3 Burr. 1262,) is also in point, to show that the death of one of the number requisite to constitute the offence charged, will not prevent the conviction of the survivor. It was the case of a riot, in which three persons, at least, are necessary to constitute the crime. There were six persons indicted, two were acquitted and two died before trial, and Lord Mansfield

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held, that the two who were convicted must have been guilty, together with one or both of the persons who had died before conviction, and yet the conviction of the two survivors was held good.

3. The remaining ground of the motion is, that the verdict offered by the jury was a competent verdict of acquittal, and ought to have been received.

The offence charged was a conspiracy to defraud the bank, and the verdict was, "that there was an agreement between Roe and the defendant, to obtain money from the bank, but with intent to return it again." This, however, is no answer to the substance of the charge, which was the unlawful and fraudulent intent to procure money from the bank. That finding leaves the truth or falsity of the accusation in equal uncertainty. The intent, afterwards, to return the money, might consist equally with a fraudulent or an innocent intent to procure the money, in the first instance.(a) This finding was, therefore, so imperfect, that had it been received, the court could not have given judgment upon it, and would have been obliged to award a *venire de novo*. The jury ought to have found either a special verdict, stating the facts at large, and leaving the law to the court, or by a general verdict they ought to have affirmed or negatived the charge of a fraudulent intent.

[*312] "I am satisfied that this was no verdict of acquittal. If it had any operation, it would be against the defendant; for, in answer to the indictment, the jury have found the fact that the defendant and Roe did agree together to obtain money from the bank, and they have not negatived the fraudulent intent.

We are of opinion, therefore, on all the points, that the defendant ought not to be discharged.(b)(c)

Motion denied.

(a) [Old note.] If a person do an act, the probable consequence of which is to defraud, it will, in contemplation of law, constitute a fraudulent intent. (Arguendo, 3 Term Rep. 176.)

(b) See *State v. Woodruff*, (3 Day's Cases in Error, 504.)

(c) Mr. Chitty remarks, (1 Crim. Law, Am. ed. 1833, p. 634,) that it is to

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be laid down as "an uncontroverted rule that a jury sworn and charged in a capital case cannot be discharged until they have given a verdict," and this proposition receives the assent of Mr. Stephens, (Criminal Law, 313,) upon the authority of Blackstone, as cited in the opinion of Mr. Justice Kent. And no cases have been found in England, with a single exception, where the jury were in a fit state to render a verdict, and the prisoner to receive it, that this power has been conceded to the court. Insanity of the prisoner, or illness which prevents him from understanding what is going forward; the sickness, (*Hector v. State*, 2 Mis. 166; *The State v. Curtis*, 5 Humph. 601,) the alienism (*Stone v. The People*, 2 Scammon, 326,) incompetence, (*People v. Damon*, 13 Wend. 351; see *Thomas v. Leonard*, 4 Scammon, 556; *United States v. Haskell*, 4 Wash. C. C. 402,) or intoxication or escape of a juror, render it impossible that a verdict should be rendered upon considerations unconnected with the power of the court to discharge in the case put. And though such a power must exist where a legal verdict cannot be obtained, it does not follow that the court has a discretion in any other case. It has, however, been held in England, where eleven of a jury were agreed, but one said he would rather die in prison than assent, that the court would order a venire in the same manner as if he had died previous to verdict; (1 Chit. Crim. Law, 634, 9 Hale, 297, 294, 295; see Doct. & Stud. 271, 272; Tri. per pais, 248; but see 1 Harg. St. Tri. pref. 2d ed. vi. and vii.;) though the rule does not seem to be well settled.

But in the courts of this country, a rule has been adopted in capital cases consistent with that laid down in *The People v. Olcott*, and *The People v. Denton*. The question was distinctly presented to the supreme court of the United States in *The United States v. Perez*, (9 Wheaton, 579,) and Judge Story there observed: "The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this as in other cases, upon the responsibility of the judges, under their oaths of office."

A reason for this view of the subject is given by Mr. Justice Kent, in the principal case, that "there is no alternative; either the court must determine when it is requisite to discharge, or the rule must be inflexible, that, after the jury are once sworn, no other jury can, in any court, be sworn and charged in the same cause. The moment cases of necessity are admitted to form exceptions, that moment a door is opened to the discretion of the court to judge

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of that necessity, and to determine what combination of circumstances will create one." This reason is quoted and approved by Chief Justice Spencer in *The People v. Goodwin*, (18 Johnson R. 187, 204,) and by Chief Justice Savage in *The People v. Green*, (17 Wendell R. 55. 56;) see also opinion of Mr. Justice Story in *United States v. Coolidge*, (2 Gallison, 364.) The same doctrine will be found stated in *Fell's case*, (9 Leigh, 613,) although the sickness of one of the jurors presented an undoubted reason for the discharge of the jury; and in *Tennessee v. Waterhouse*, (Mart. & Yerg. 278.)

In *Mahala v. The State*, (10 Yerger, 535,) it is said that the discharge ought not to be granted except in a case of manifest necessity; and in *Commonwealth v. Clue*, (3 Rawle, 498,) neither an inability to agree, (*Ned v. The State*, 7 Porter, 187,) nor any sickness of a juror, which can be removed by refreshments, is considered within this rule. Whatever the necessity may be upon the case of *State v. Ephraim*, (2 Dev. & Bat. 162,) in North Carolina, it is required to be set forth upon the record. In Pennsylvania the rule stated by Lord Coke, (1 Inst. 227, b.; 3 Inst. 110,) seems to have obtained a firm station, subject to the modification of *Mahala v. The State*, and accordingly a jury will not be discharged in a capital case, upon a disagreement, without the consent of the prisoner. (*Commonwealth v. Cool*, 6 Serg. & Rawle, 577—See *Garrat v. Garrat*, 4 Yeates, 244.) See further, upon this subject, *People v. Ellis*, 15 Wend. 371. *The State v. Wilson*, 7 Alabama, 610. *The State v. Moor*, Walk. 134. *Rex v. Edwards*, 4 Taunt. 309; 3 Camp. 207; n. R. & R. C. C. 234; 2 Leach, C. C. 621. *Rex v. Scalbert*, 2 Leach, C. C. 620; Barbour Mag. Crim. Law, 317, 318; also 12 Eng. Com. Law Rep. 195; id. 196, n. 18 id. 115. *The People v. Barrett*, 2 Caines, 100.

JENKINS against PEPOON.

To an action of debt on a judgment in the circuit court of the United States, for the district of Massachusetts, the defendant pleaded, that the record of the judgment had been removed, by writ of error, according to law, into the supreme court of the United States, wherefore he prayed judgment, &c. On demurrer, the plea was held bad.

A writ of error pending may be pleaded in *abatement* to a suit on the judgment; but the plea must be drawn with precision, and conclude clearly, in abatement, and not in bar. The plea must also state that the writ of error was brought before the action was commenced on the judgment, and must show all those steps taken which are required by law to make it a *superse-des*; as, in the present case, that a copy of the writ of error, for the adverse party, had been lodged in the clerk's office, within ten days after the judgment was rendered.

THIS was an action of debt, on a judgment obtained in

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the circuit court of the United States, for the district of Massachusetts.

The plea stated that the record of the judgment was removed into the supreme court of the United States, by writ of error, according to law, wherefore, the defendant prayed judgment, &c. To this plea there was a general demurrer and joinder.

Champlin, for the plaintiff.

Riggs, contra.

KENT, J. delivered the opinion of the court. The ancient authorities lay it down as law, that a writ of *error is no *supersedeas* to an action of debt, on a [*313] judgment. (Dy. 32, pl. 5. T. Raym. 100. 2 Bac. Abr. 211, and the authorities there cited.) But it has since been otherwise determined, and seems now to be settled, that a writ of error pending may be pleaded in abatement, though it may not be pleaded in bar, to a suit on the judgment. (Carth. 1. 1 Lord Raym. 47. Skin. 590. 1 Lilly's Entr. 11.)

The plea, however, in the present case, is, in several respects, bad. It does not conclude, either in abatement or in bar. A plea in abatement is to be known by its conclusion, (10 Mod. 112,) and requires great precision; but it is impossible to tell whether this was intended as a plea in abatement or in bar, though perhaps this objection is not good but on a special demurrer. (3 Term Rep. 186.) The plea does not state that the writ of error was brought prior to the commencement of the present suit; which is an essential averment to render a plea of this kind good. (Carth. 1. 1 Lilly's Entr. 11.) Nor does it state the requisite steps taken, to render a writ of error a *supersedeas*, even to an execution on the judgment, under the act of congress, which says, that a writ of error is no *supersedeas* to an execution, unless a copy of it be lodged, for the adverse party, in the clerk's office, where the record remains, within ten days after judgment rendered. And, if it be no *supersedeas* to an execution on the judgment, there is no reason why it should abate an action of debt on the judgment. So, that on either of the

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two last grounds, we are of opinion that the plea is bad, and that judgment must be rendered for the plaintiff.

Judgment for the plaintiff.(a)

[*314] *JACKSON, *ex dem.* BEACH and others, *against* DURLAND.

Where a husband is witness to a will containing a devise to his wife, such devise is void, and the husband is a competent witness.

A. devised lands to the use of his wife for life, and to B. in fee, and if he died before arriving at full age, then to the surviving brothers of B. in succession, if of full age, then to the first son of his niece M. and his heirs and assigns for ever, and in default of such issue, remainder over to his own right heirs; and directed that in case his wife should die before B. or his surviving brother should be of age, then his niece M. should take possession of the lands until his heir should be of age. The wife and niece of the testator both died before B. came of age. It was held that B. had a vested interest in possession, on the death of the widow, and that the devise to the niece failed.

Where the whole property is devised with a particular interest given out of it, it operates by way of exception.

Where an absolute property is given, and a particular interest is given, in the mean time, as until the devisee comes of age, this will not operate as a condition precedent, but as a description of the time when the remainder-man is to take possession. Where a precedent limitation, by any means whatever, fails, the subsequent limitation takes effect.

THIS was an action of ejectment for land in Goshen, in the county of Orange.

The following facts appeared from the special verdict, found at the circuit.

Thomas Beach, being seised of the premises in question, on the 18th May, 1795, made his last will and testament, as follows: "I give my loving wife, Martha Beach, the use and benefit of the house I now live in, and all my lands and tenements, lying in the county of Orange, aforesaid, during her natural life. And I do also give her," &c. "I give and

(a) See Graham's Practice, 3d ed. vol. i. p. 624.

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devise to Thomas Durland, son of Joseph Durland, and to his heirs and his assigns for ever, all the lands that I am seised of at my death, lying in the county of Orange, or elsewhere; but if he shall not live to be of age, then I give the same, in like manner, to his surviving brother, James Durland; but if James shall die before of age, then I give the same in like manner, to his surviving brother Charles; but if Charles should die before of age, then I give the same to the first surviving lawful son, born of my niece, Martha Durland, and to his heirs and assigns, for ever; for default of such issue, then such estate to remain to my own right heirs, for ever. If my said wife shall die before the said Thomas Durland, or before his survivor be of age to take possession of the said lands, in that case, I order that my said niece, Martha Durland, shall have the use and benefit of my said lands, until my heir shall be of age to take possession." One of the subscribing witnesses to the will was Joseph Durland, the defendant, who was, at the time, married to the testator's niece, *Martha Durland. The testator died the 22d [*315] May, 1795, leaving two brothers and three sisters, besides his niece, Martha, and several nephews and nieces, children of his deceased brothers and sisters. Thomas Durland is still living, under age. Martha Beach, the widow of the testator, died the 27th October, 1795; and his niece, Martha, also died the 9th December following, and prior to the time of the demise laid in the declaration. The defendant, Joseph Durland and his wife, lived on the premises, with the testator, until his death, and with the widow until her death, and the defendant has since remained in possession.

The lessors of the plaintiff claim two-third parts of the premises, as heirs at law.

The council for the plaintiff contended, 1. That the devise was void *in toto*, or at least so far as respected the devise to Martha, because her husband was one of the witnesses to the will.

2. That upon the death of the widow of the testator, the estate descended, *ad interim*, to the heirs at law, until the arrival of Thomas Durland to full age.

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S. Jones, jun., and Evertson, for the plaintiff.

Harison and Troup, contra.

Per Curiam. The first point comes within the decision of this court, in the case of *Jackson, ex dem. Cooder and others v. Wood*. (See 1 Johns. Cas. 163.) It was decided in that case, that a devise to the husband, in a will to which the wife was a subscribing witness, was void by the statute equally as if the husband himself had attested the will; and that this arose from the unity of husband and wife, who were regarded in law as one person; and a devise to the one was considered, in respect to the competency to attest, [*316] as a devise to the other. The devise to the husband being void, the wife was held to be a competent witness.

So, in the present case, the devise to Martha, the niece, her husband being a witness, is void, and her husband a competent witness to the will, which is valid as to all its other dispositions.

The only real question, then, in the present case is, whether, upon the just construction of the will, Thomas Durland had a vested interest before he arrived at full age, so as to prevent the existence of any *interim* estate.

Putting out of view the devise to Martha, the niece, the will contains a devise of the premises to the widow for life; and then a devise of the same to Thomas, in fee, with a remainder over, in case he should not live to be of age. This is obviously creating a vested remainder in Thomas, and if the will had stopped here, there could be no room to doubt. The only difficulty that can arise is upon that clause of the will containing the devise to the niece of the use of the land, after the death of the widow, until Thomas should be of age to take possession; by which it would seem to be the intent of the testator that Thomas should not take possession until he was of age. If that intent be manifest, and is to govern, then, as no valid disposition has been made in the mean time, the estate must descend to the heirs until the contingency happens. (2 Mod. 292. Cro. Eliz. 878. Cases temp. Talbot, 51, 52.) But this case is analogous to those of *Haywood*

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v. Whitby, and *Weedon v. Lea*. (1 Burr. 228. 3 Term Rep. 41. 1 Eq. Cases Abr. 195.) There is not a condition precedent resting in contingency, but an absolute interest vested in Thomas; and the will only denotes the time when the remainder is to take effect in possession. (Willes's Rep. 293, 301.) The devise to the niece was an exception out of the absolute property devised to Thomas.

In the case of *Haywood v. Whitby*, (1 Burr. 233,) Lord Mansfield said it was a general rule, that where the *whole property was devised, with a particular inte- [*317] rest given out of it, it operates by way of exception out of the absolute property; and that where an absolute property is given, and a particular interest is given, in the mean time, as until the devisee shall come of age, this should not operate as a condition precedent, but as a description of the time when the remainder-man is to take possession. The rule in the construction of these conditional limitations, as laid down by Lord Hardwicke, (1 Vesey, 422; 2 Bro. C. C. 396, 397,) is the just and prevalent one; that if the precedent limitation (as in the present instance, the devise to the niece) is out of the case, by what means soever, the subsequent limitation takes place. This rule was adopted by Lord Thurlow, in the case of *Doe v. Brebant*. (3 Bro. C. C. 397.) Here the devise to the niece failed. Thomas had a vested interest in possession on the death of the widow, and the intent of the testator was merely to provide that the mother of Thomas should be trustee, to take the profits after the death of his wife, and until Thomas was of age to take possession, and enjoy and act for himself. Thomas was the object of the testator's bequest, and he never meant that the remainder should be contingent until he came of age, so that if he married in the mean time and died, his children could not inherit. We are of opinion, therefore, that the whole legal estate vested in Thomas on the death of the widow, and that the heirs at law have no title to the premises.

Judgment for the defendant.(a)

(a) See 1 R. S. of New York, 1st ed. 723. 4 Kent's Comm. 202, *et seq.* *Dingley v. Dingley*, 5 Mass. 535. Burton on Real Property, 249.

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*ALEXANDER *against* BYRON.

Where a witness, who was regularly *subpœnaed* by the defendant, was out of the way when the trial of the cause commenced, and did not appear in court until after the testimony on both sides had closed, and the counsel for the defendant had proceeded to sum up the evidence, and was then offered to be examined, but was refused by the judge, and a verdict was found for the plaintiff; it was held, that the admission of the witness offered was altogether discretionary with the judge, who acted reasonably in refusing to admit him under the circumstances, and that a new trial ought not to be granted.

It cannot be claimed as a matter of strict right by either party at a trial, to open the cause to proof after full opportunity has been given to each side to be heard, and the testimony has been regularly, and by mutual consent, closed. Per *Kent, J.*

THIS was an action of *assumpsit* on two promissory notes. Plea *non assumpsit*. At the trial the defendant set up the defence of *usury*.

The trial commenced on Thursday, and lasted till Friday evening, and many witnesses were examined on both sides, and a verdict was found for the plaintiff.

A motion was made on the part of the defendant for a new trial, on the ground of a refusal by the court to permit a witness offered by the defendant to be examined.

The witness was refused under the following circumstances: he had been subpœnaed long before the trial of the cause; he resided on York island, nine miles from the city, and had a counting-house in the city, where he usually attended to business. After being subpœnaed, the witness went to Philadelphia, and returned on the day the trial began, about one o'clock P. M. during the trial, and appeared in court in the afternoon of the same day, after the testimony on both sides had closed, and the counsel for the defendant declared they had done with the examination of witnesses, and had proceeded in summing up the cause. The witness was then offered, by the defendant, to prove positive confessions of the plaintiff, that he had never let out money on le-

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gal interest only. The counsel for the plaintiff objected to his admission in that stage of the cause, and because the plaintiff and all his witnesses had left the court, and could not be procured in time for a new discussion of facts. The witness was accordingly refused by the judge.

Hamilton, for the defendant.

Harison, B. Livingston and *Troup*, contra.

*KENT, J. This is not a question on the propriety of the verdict, in respect to the evidence given. [*319]

The facts are not stated in the case, nor any dissatisfaction alleged with the verdict, upon the evidence received. We, therefore, cannot say or intend, that the verdict is against evidence; nor can we say how far this general confession of the plaintiff, if it had been received, would have varied the decision, because we have no lights by which the testimony can be compared.

The question is, then, simply whether it was the duty of the judge, under the circumstances of the case, to have received the witness at the time he was offered?

It can never be claimed by either party, at trial, as a matter of strict right, to open the cause to proof, after full opportunity has been given to each side to be heard, and the testimony has been regularly, and by mutual consent, closed. It was, therefore, properly admitted, upon the argument of this motion, that the subsequent admission of testimony must rest upon the discretion of the court, duly exercised, according to the circumstances of the case. The parties must come to trial prepared, at their peril; and if either party has any good excuse for not being prepared, he is entitled, of right, to a postponement of the trial.

It has, therefore, repeatedly been held (2 Salk. 645, 753; 6 Mod. 222,) that the subsequent allegation of a party, that he was not prepared, is no reason for granting a new trial, unless it be founded on the discovery of testimony of which the party was not at the time apprized.

In the present case the defendant was apprized of the testimony of the absent witness, for he had subpoenaed him,

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and it seems he was willing to hazard the experiment of a defence without him. It is not stated in the case, although it is probably the fact, and so I consider it, that the [*320] defendant did not know the witness had arrived *from Philadelphia until he came into court on the second day. But when he was offered, a long examination on each side had closed, and the counsel were commenting on the proofs. If, however, the plaintiff and his witnesses had been present, I think it would have been reasonable to have examined the witness. No injury to the plaintiff could have resulted. But after the counsel for the defendant had declared they had done with the examination of witnesses, and the plaintiff and his witnesses had, in consequence of it, left the court, it would then have been unreasonable to have received the witness, unless the plaintiff with his witnesses had been recalled. I do not think that witnesses are bound to stay after the parties have declared they have done with the proofs; for this is equivalent to a discharge of the parties. If the witness had been received, and had testified what he was offered to prove, it might have made a decisive change in the weight of the proofs. It would, in fact, have been a fresh trial of the cause; and unless the plaintiff had full opportunity to have been present with his witnesses, to have repelled the testimony, if in his power, he would have just cause to complain, on the ground of surprise, and it would perhaps have been sufficient cause for a new trial if the verdict, under such circumstances, had passed against them.

I cannot, therefore, say, that in the present case the judge has not exercised a due discretion. If the question was now for a new trial, on the merits of the case, the facts stated might probably have their influence upon the determination; but as the merits are not before us, we are confined by the case to the simple question, whether, under the circumstances, herein stated, the judge was bound, in sound discretion, to have received the witness.

I am of opinion that the motion ought to be denied.

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*LANSING, Ch. J. and LEWIS, J. were of the same [*321] opinion.

RADCLIFF, J. was absent.

Rule granted.(a)(b)

JACKSON, *ex dem.* POTTER and others, *against* SISSON.

A patent for certain lands was granted to A. B. and C. for themselves and their associates, being a settlement of friends on the west side of Seneca lake, to have and to hold the same to A. B. and C. as tenants in common, and their associates; it was held, that no *legal* estate vested, except in the three persons named in the patent.

An equitable title cannot prevail in ejectment, against the legal estate, especially if such equitable estate be dubious.

THIS was an action of ejectment for lands in the town of Jerusalem, in the county of Ontario.

The declaration stated, 1. A demise, by William Potter, for lot No. 16 in the gore land granted by letters patent to James Parker, William Potter and Thomas Hathaway, and their associates; 2. A demise by the above three persons, and five others.

On the trial, at the Ontario circuit, in June, 1800, the defendant admitted himself to be in possession of lot No. 16,

(a) [Old note.] See *Edwards and others v. Sherratt*, 1 East, 604.

(b) In the case of *Mercer v. Sayre et al.* (7 Johns. R. 306,) it was decided that where the counsel for the defendant, after he had summed up the evidence in the cause, and while the plaintiff's counsel was addressing the jury, discovered new and material evidence, which he offered to produce; but the judge, supposing he had no discretion, refused to admit it, unless the plaintiff's counsel would consent, which being refused, a verdict was found for the plaintiff; it was held, that the judge had a discretion to admit the evidence; and that, therefore, the defendant was entitled to a new trial; and in *Jackson, ex dem. Johnson v. Tallmaidge*, (4 Cowen, 450,) it was held that after the regular examination of witnesses upon a trial is through, and the counsel for the defendant has commenced summing up, it is in the discretion of the judge whether he will hear further evidence. These cases, together with the principal case, are cited and approved in *Merrills v. Law*, 9 Cowen, 65, 68. (See also *People v. Rector*, 19 Wend. R. 569. *People v. Mather*, 4 Wend. R. 229, 248. *Curren v. Connery*, 5 Binney, 488. *The State v. Silver*, 3 Dev. 332. *Freleigh v. The State*, 8 Min. 606. *Brown v. Burrus*, id. 26.)

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and the lessor of the plaintiffs produced the letters patent for the premises in question, bearing date the 10th day of October, 1792, by which the same were granted, by metes and bounds, to James Parker, William Potter and Thomas Hathaway, for themselves and their associates, being a settlement of friends on the west side of the Seneca lake; to have and to hold the same unto the said three persons, as tenants in common, and not as joint-tenants, for themselves and their associates as aforesaid, in fee.

The plaintiff then produced a deed from James Parker and Thomas Hathaway, bearing date the 16th August, *1793, conveying to William Potter, in fee, for a valuable consideration, lot No. 16 aforesaid.

The defendant then offered sundry letters from James Parker, one of the patentees aforesaid, between the 17th October, 1787, and the 4th March, 1788, addressed generally to the Universal Friends, and relating to the settlement of the friends on the west side of the Seneca lake. He also offered three petitions from James Parker, in the name of the settlement, and addressed to the commissioners of the land office, bearing date in April and May, 1791, respecting the purchase of lands of which the premises are a part, and an acceptance of his proposal by the commissioners of the land office, at a meeting held on the 9th May, 1791.

The contract with the commissioners was fulfilled by the society, of which James Parker appeared to be the principal member, on the 29th February, 1792. By another letter of James Parker, addressed to the commissioners on the 15th September, 1792, he stated his former contract with the commissioners for 12,000 acres of land, for himself and his associates, and named the other two patentees and the present defendant.

The community of friends met on the 27th October, 1791, among whom was William Potter, one of the lessors of the plaintiff. They came to sundry resolutions, by which they appointed the other two patentees above named a committee to receive the contract from Parker, and to indemnify him for his contract with the commissioners of the land office,

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and compensate him for his trouble ; and directed the members of the community to pay their proportion of the expense of the lands, and that they should receive land in proportion to their advances.

The defendant paid 20 dollars to William Potter, on the 22d November, 1791, towards his proportion of the purchase-money of the lands ; and he paid, at another time, seven dollars and fifty cents. At the time the letters *patent issued, there was a settlement of friends on [*323] the land contained in the patent, and the defendant was one of that society.

There were then offered in evidence, on the part of the plaintiff, sundry resolutions of the society, and among others a resolution made at a meeting on the 15th August, 1793, at which the defendant was present, and by which it was resolved that the lands should be divided into 12 parts ; and the same was done accordingly, and ballots were drawn with the approbation of the meeting, by which lot No. 16, being the premises in question was included in class No. 10, and fell to William Potter, one of the lessors of the plaintiff ; and the defendant had allotted to him an interest in class No. 5, containing two lots. The defendant advanced only 37 dollars and 50 cents, and the said William Potter about 2,000 dollars, or above a moiety of the whole purchase-money.

Upon these facts, a verdict was taken for the plaintiff, by consent, subject to the opinion of the court, as to the competency and sufficiency of the evidence above stated.

Emott, for the plaintiff.

Riggs, contra.

KENT, J. I shall confine myself to one or two points, which appear to be sufficient to determine the cause.

There was no legal estate created by the patent, but what vested in the three patentees named. The description of the association, by the words, "a settlement of friends on the west side of the Seneca lake," was too vague and uncertain to constitute a competent grantee at law, or a *cestuy que use*, whose estate the statute would transfer into possession. (Saunders on Uses, 63, 128.) This would be like a grant

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[*324] to the parishioners, or inhabitants *of a dale, or to the commoners of such a waste, or to the churchwardens of a parish, which are held to be void grants. (Shep. Touch. 235, 236.) But the grant from the state is not to the three patentees named and to their associates. It is to James Parker, William Parker and Thomas Hathaway, for themselves and their associates, being the settlement aforesaid; and therefore, from the words of the grant, as well as from the uncertainty of the description, it is evident the associates had only an interest in equity, and that Parker and the others were vested with the legal estate as trustees for the association.

What, then, are the equitable rights of the associates, and how far the trust has been executed by the grantees, are questions that do not belong to this court to decide, nor shall I undertake to give any opinion upon them.

A court of law is incompetent to settle the complicated and interfering interests of the parties to the trust. Our duty is, therefore, to look to the legal estate, and to give it effect.

But it is said that this court ought to look so far to the equitable rights of the parties as to protect a *cestuy que trust*, in possession, against the legal estate of his trustee.

There are several cases in which courts of law have recognised and helped the equitable estate of a party; but in those cases the equitable interest was clear and precise. In the case of *Lade v. Holford*, (Bull. N. P. 110,) the principle decided by Lord Mansfield was, that where the beneficial occupation of an estate may possibly suppose a conveyance to the person equitably entitled to it, the jury may be directed to presume one. This doctrine, however, proceeds on the ground of the conclusive efficacy of the legal estate in a court of law; and it has accordingly received the subsequent approbation of Lord Kenyon, (2 Term Rep. 696; 8 Term Rep. 122,) who has taken great pains to preserve unimpaired the marked boundaries between the courts of law and of equity. In the *case of *Armstrong, ex dem. Tinker v. Pierce*, (3 Burr. 1901,) the court of K. B. looked

upon it as a settled point, that the formal title of a trustee should not, in an ejectment, be set up against the *cestuy que trust*, because, from the nature of the two rights, the *cestuy que trust* is to have the possession. This position does not apply to the present case, because it does not appear that the defendant was to have possession of the premises in question. And, besides, the position is too general. It requires, and always has received qualification, in its application to particular cases; for the court of K. B. afterwards, in the cause of *Goodtitle, ex dem. Estwick v. Way*, (1 Term Rep. 737,) observed, that the only cases where the principle had been adopted were such in which the lessor of the plaintiff had been clearly and unequivocally a trustee for the defendant; and it would have been, of course, for the court of chancery to have decreed a conveyance to him; and in that case, as it was at least a doubtful equity which the defendant set up against a legal title, the court would not interfere.

Again, in the case of *Doe, on the demise of Bristow, v. Pegge*, (1 Term Rep. 758, in note,) it was decided that where a legal term was created for a particular purpose, if the purpose was satisfied, or if it was unsatisfied and not connected with the litigating parties, it should never be set up against them in ejectment.

It is obvious that this case does not apply, for here the trust itself is the thing in litigation, and these are the strongest decisions that have regarded and given effect to equitable titles, in an action of ejectment. Even this latter decision has since been receded from, and the party clothed with the legal estate has repeatedly been permitted to prevail against any equitable title; (2 Term Rep. 684; 7 Term Rep. 43, 47; 8 Term Rep. 2, 122;) and the only way in which it can now be assisted is, by permitting the jury, in certain cases, to presume the "legal estate not to exist any [*326] longer out of the *cestuy que trust*."

Whether this court ought to follow the former or the latter decision, it will be in season to determine when the question arises. At present, it is sufficient to say that no case goes so far as to permit an equitable claim, so involved and

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dubious as the present one, which is litigated between the parties, to prevail against the legal estate.(a)

I am of opinion, therefore, that the verdict for the plaintiff ought not to be disturbed.

LANSING, Ch. J. was of the same opinion.

LEWIS, J. was of opinion that a good estate *in law* was vested in Parker and his associates, under the patent, according to the description; but he agreed that the plaintiff was entitled to recover as tenant in common.

RADCLIFF, J. was absent.

Judgment for the plaintiff.

(a) In order to enable a claimant to support an action of ejectment, he must be clothed with the legal title. (Adams on Ejectment, 32. Roscoe on Actions relative to real property, 490. *Goodtitle ex dem. Jones v. Jones*, 7 T. R. 43, 47. *Doe ex dem. La Costa v. Wharton*, 8 id. 2. *Doe ex dem. Reade v. Reade*, id. 118, 123. *Doe ex dem. Blake v. Luxton*, 6 id. 269. *Doe ex dem. Shewen v. Root*, 5 East, 138, overruling the doctrine of Lord Mansfield's time. *Lade v. Holford*, B. N. Prius, 110. *Keech ex dem. Hall v. Warne*, Dougl. 21. *Doe ex dem. Bristowe v. Pegge*, 1 T. R. 759 (n.) *Jackson ex dem. Smith v. Pierce*, 2 Johnson, 221. *Jackson ex dem. Simmons et al. v. Chase*, id. 86. *Jackson ex dem. Whitlock v. Deyo*, 3 Johnson, 422, 423. *Jackson ex dem. Kemball v. Van Slyck*, 8 Johnson, 487. *Jackson ex dem. Livingston v. Sclover*, 10 Johnson, 368. *Jackson ex dem. Colden v. Paul*, 2 Cowen, 502. *Thompson v. Wheatley*, 5 Smodes and Marshall, 489. *Winn v. Cole*, Walker, 119. *Lessee of Spencer v. Mackle*, Ohio, Con. R. 356. *Jared v. Goodtitle*, 1 Blackford, 29. *Doe ex dem. Wood v. West*, id. 133. *Sims v. Irvine*, 3 Dallas, 425. *Cooper v. Galbreith*, 3 Wash. C. C. 546. *Botte v. Shields*, 3 Little, 32. *Eggleston v. Bradford*, 10 Ohio, 312. *Wilson v. Julves*, 11 Gill & Johnson, 351.)

Many other cases might be cited if it were desirable to confirm this principle, which is so fixed and immutable, that a trustee may maintain ejectment against his *cestuy que trust*. (See Adams, *ut sup.* Roscoe, *ut sup.* *Roe ex dem. Reade v. Reade*, 7 T. R. 118, 123.) And a trustee holding the legal title may maintain ejectment even after the trust is satisfied. (*Hopkins, &c. v. Stephens et al.* 2 Randolph, 422. See farther, on this subject, Tillinghast's Adams on Ejectment, ed. 1846, p. 32.)

*FOSTER *against* HOYT AND TOM.

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A. the master of a vessel, directed B. as his agent, to get his commissions as master insured, and C. the broker, had the policy effected in the name of B. on the commissions of the master, who was named in the policy, and the agency of B. was known to the broker. A total loss having been recovered by the broker, A. brought an action against him for the amount of the money received; and it was held that the broker had no right to retain it for a debt to him from B. the agent.

If, however, B. had acted as the ostensible principal, C. would have been entitled to consider him as such, and to regulate his claims accordingly. Per *Kent, J.*

THIS was an action of *assumpsit* for money had and received. A verdict was taken for the plaintiff for 500 dollars and 72 cents, subject to the opinion of the court, on a case stated.

John Saunders, as agent of the plaintiff, employed the defendants, who are insurance brokers, to effect an insurance for the plaintiff, on his *commissions*, as master of the sloop *Clermont*, on a voyage from New-Fields, in Connecticut, to *Martinique*. The defendant accordingly caused an insurance to be made, by a policy dated 23d April, 1799, in the name of Saunders, but on the *captain's commissions* on goods on the voyage above mentioned, and the plaintiff was specified to be the master. The commissions were valued at 600 dollars. The letter of the plaintiff to his agent, directing the insurance, said it was in part for the agent. A total loss ensued, and the agent delivered the policy to the defendants to collect, with orders to pass the net amount, when received, to his credit with them, on condition that the defendants did not recover a debt due the agent, and which they were prosecuting in Connecticut, towards paying a balance due them from the agent, and if they did recover the debt, &c. then with orders to pay the net amount to him.

The debt was recovered by the defendants. When the agent delivered the policy to the defendants to collect, the plaintiff owed him 45 dollars and 50 cents on book account,

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and 200 dollars by a promissory note. The note the agent soon after passed away ; and it was notorious, at the time of the delivery of the policy, that the agent was insolvent.

The defendants recovered for a total loss on the policy, the net amount of which was equal to the verdict found, [328] *after deducting their charges, and the book debt of 45 dollars and 50 cents.

The balance still due to the defendants from the agent is equal to the amount of the verdict, and the question is, whether they are entitled to retain it against the claim of the plaintiff.

Troup and B. Livingston, for the plaintiff.

Harison, contra.

KENT, J. delivered the opinion of the court. The defendants knew Saunders in this transaction, only in the capacity of agent for the plaintiff, whose exclusive interest appeared evidently on the face of the policy. This is not like the case where the principal is masked, and the agent acts as the ostensible principal. (7 Term Rep. 360.) In that case it is admitted that whoever deals with the agent has a right to consider him as the principal, and to regulate his claims accordingly. Here the defendants appear to have acted under a full knowledge of the relation between Saunders and the plaintiff. The only circumstance that could raise any possible doubt in the case, is the observation in the plaintiff's letter : " I beg you will not neglect me, as it (meaning the insurance) is for yourself in part." But whatever may be the meaning of this note, it does not appear to have been disclosed to the defendants, or if it was, that they acted under its influence, or that it was true in point of fact, that Saunders had any interest in the commissions. It is possible the letter had reference only to the interest which Saunders, as a creditor of the captain, must have had in the success of his voyage. When the policy was deposited with the defendants for the collection, the agency under which it was originally effected, the plaintiff's sole interest as master of the sloop, and what appeared on the policy, were known [329] to *the defendants ; and under these circumstances,

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there cannot be any just pretence to permit them to consider the agent as the principal, and to set off their claim, founded on other matter against Saunders, to a suit by the plaintiff. The money was received by intendment of law, for the use of the plaintiff; and the defendants are bound in equity and good conscience to refund it.

Judgment for the plaintiff accordingly.(a)(b)

(a) [Old note.] See Marshall on Ins. 301, 302, 2d ed. Add 1 Phillips on Insurance, ed. 1840, p. 105; *King v. Glover*, 5 Bos. & Pull. 206, to the effect that the wages and commissions of the captain, or his privilege on board of the vessel, are an insurable interest.

(b) The general rule that an insurance broker has a lien on the policy that he effects, against his immediate employer, not only for the premium and commissions arising and paid upon the particular transaction, but also for the general balance of his insurance account, is too well established to require more than a passing reference to the leading authorities. (See Dunlap's Paley's Agency, 127, 147, 148, 150, 151. Duer on Insurance, vol. 2, pp. 281, 282. Story on Agency, § 379. *Cushing v. Aubert*, 2 East, 285. *George v. Claggett*, 7 Term R. 357. *Whitehead v. Vaughan*, *Parker v. Carter*, Cooke's Bank. 579. *Oliver v. Smith*, 5 Taunt. 56. *Stracy v. Deey*, 7 Term, 357, n. *Spring v. S. C. Ins. Co.* 8 Wheat. 268. *Moody v. Webster*, 5 Pickering, 424. *Wells v. Archer*, 10 Serg. & Rawle, 412.) And it matters not that the employer was an agent, unless this fact was known to the broker when the insurance was made. (Dunlap's Paley, 150, and references. Duer on Insurance, *ut sup.* and references.)

In *Westwood v. Bell*, (4 Campb. 352; 1 Holt, 122,) Chief Justice Gibbs observed, that "the party who seeks to deprive him," (the policy broker,) "of his lien, must make out the affirmative. The employer is to be taken to be the principal, until the contrary is proved." It is, therefore, of importance to determine what constitutes a sufficient notice to the broker, that the person who obtains the policy as agent, is acting in that capacity. The leading case upon this subject in England is the case of *Mauns v. Henderson*, (1 East, 335,) decided just before the principal case. In that case, Jennings, an English merchant, resident in England in time of war, received orders from a neutral foreigner to effect insurance upon a ship, the property of the latter. Jennings employed his usual broker to get the policy done in his own name, but informed him that the interest was neutral. The broker, having received the amount of the loss upon the policy, refused to pay it over to the owner of a ship, insisting upon a right to retain for a demand which he had upon Jennings. A verdict was found for the plaintiff, the owner deducting only the premiums upon that particular policy; for Lord Kenyon was of opinion, that the information conveyed by Jennings to the broker that the interest was neutral, was a sufficient indication that he was only acting as agent for another, though the principal name was not then disclosed; and consequently that the

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HOLMES against THE UNITED INSURANCE COMPANY.

A policy of insurance was effected on the cargo of a ship from Calcutta to Baltimore, by A. as the agent of B. and for his account. The policy was in the name of A. generally, for 25,000 dollars, as interest might appear. The cargo belonged to B. and four other persons, and was purchased with the proceeds of the outward cargo. B. carried on business for himself, and was unconnected in trade with the other persons, who knew nothing of the insurance. The proportion of the return cargo belonging to B. in fact amounted only to about 13,000 dollars. B. brought an action for a return of premium, for the difference of the sum subscribed to the policy, and the amount of his interest; it was held, that B. and the four others were not partners, and that B. was entitled to recover back the premium for the amount of his interest over valued in the policy.

If property be insured to a larger amount than the real value, the overplus premium is recoverable by the assured, because the insurer shall not receive the price of a risk which he has not run. *Per Kent, J.*

To constitute a partnership, there must be a reciprocal choice and agreement of the parties to unite their stock and to share in all risks of profit and loss. They must not only be jointly concerned in the purchase, but jointly concerned in the future sale. *Per Kent, J.*

THIS was an action of *assumpsit* for a return of premium on a policy of insurance.

defendant, the broker, had no lien upon the policy as against the plaintiff for his general balance against Jennings. And this direction was confirmed by the court of king's bench, on a motion for a new trial. And upon the same principle it was decided in another case, where an insurance broker had employed a sub-agent to effect policies, informing him at the time that they were for a correspondent in the country; that the sub-agent had not, as against the principal, a lien on the policies for the general balance due to him from the broker, but a particular lien only for the premiums and commissions. (*Sneek v. Davidson*, 3 Camp. 218.) In *Lanyon v. Blanchard*, (3 Campb. 597,) an action was brought to recover the amount of a loss received by the defendant, upon a policy of insurance which he had effected as broker. The plaintiff, being at Montevideo, wrote to one Crowgy, at Falmouth, enclosing an unendorsed bill of lading of some tallow deliverable to the shipper's order, and directed him to effect an insurance on the tallow, and to employ a good house at Liverpool to sell it for the plaintiff's benefit. Crowgy came to London, employed the defendant to effect the insurance, represented that he had authority to endorse the bill of lading, and actually did endorse it accordingly to a person at Liverpool named by the defendant. The ship having been lost, and the defendant having received the money from the underwriters, he

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In December, 1796, Gouverneur and Kemble, as agents for the plaintiff, effected an insurance on the cargo of the

claimed a right to retain it, to satisfy a balance due to him from Crowgy. But Lord Ellenborough was of opinion, that in transactions of this sort, if an agent represents himself to have power which is not entrusted to him, his principal is not bound by his acts; that the person who gives faith to the representations of the agent, must run the risk of their being true or false: and that as Crowgy had no authority to endorse the bill of lading, or to act as proprietor of the tallow, the defendant was only a sub-agent, and could not retain the sum he had received upon the policy from the person for whose ultimate benefit it was effected. Speaking of this case, (*Lanyon v. Blanchard*), Mr. Livermore, (Pr. & Ag. vol. 2, p. 97,) says: "This case is not inconsistent with the preceding cases of *George v. Claggett*, (7 Term Rep. 359;) *Rabens v. Williams*, (cited 7 Term Rep. 360, n.;) *Mann v. Forrester*, (4 Campb. 60,) &c., nor does it at all support Mr. Campbell's statement in the marginal note to the case. The bill of lading showed that Lanyon was the principal, and Crowgy but an agent. There can be no doubt that where a person deals *ex mandato*, and this is known to the person with whom he deals, such person must look to the agent's authority. If by the bill of lading the goods had been deliverable to the order of Crowgy, or if there had been a general endorsement which would have enabled him to hold himself out as the owner of the goods, then, upon the authority of the above cases, the broker would have been entitled to consider him as principal, and to retain for the balance of his account against him. But when, by the bill of lading, the goods were to be delivered to the order of the plaintiff, and there was no endorsement, Crowgy appeared upon the face of the transaction to be acting only as agent, and his mere declaration cannot clothe him with another character." (See Dunlap's Paley, 149, n. 17.) Mr. Duer comments upon this case as follows:—"Looking at the facts of the case, and disregarding the marginal note, it is evident that the agent not only did not represent himself as the owner of the goods insured, but that the defendant, the broker, was bound to know, and did know that he was merely an agent. The unendorsed bill of lading was conclusive to show that the ownership of the goods was still vested in the plaintiff, the shipper, and that it could only be divested by an endorsement made by him, or by his authorized agent. It was this authority, that the person who employed the defendants, represented himself as possessing, and the representation was, in its very terms, an admission of his agency. The broker had no right to infer that his employer had any interest of his own that he meant to cover by the insurance." (Duer on Insurance, vol. 2, p. 356, 357.) Mr. Dunlap remarks, (Agency, 149, n. 17,) "The reason of the rule was well explained by Lord Chief Justice Tindal, in a recent case,—where the question was as to the right of a banker to retain the property of a third person deposited with him by the agent of that person for a debt due from the agent himself. The contract of lien 'being made between the banker and the customer only cannot,' said his lordship, 'bind the rights of other parties. It is com-

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ship George and Patty Washington, to the amount of 25,000 dollars, interest as may appear, at and from Calcutta to Baltimore; and the defendants accordingly underwrote the policy to the amount of \$25,000 on the cargo generally, in the name of the agents. The premium was seven per cent. amounting to 1750 dollars and 25 cents, and was paid to the defendants on the 6th of August, 1797. The cargo of the ship belonged to the plaintiff and four other persons, and was purchased with the proceeds of the outward cargo, which also belonged to the same persons. One-eighth of the ship, and of the outward and return cargoes belonged to [*330] the plaintiff, *who carried on business for himself, unconnected in trade with the other four persons. The other four persons had no direction or concern in the insurance, or any other insurance effected by the plaintiff. The plaintiff's instructions to his agents were to effect insurance to 25,000 dollars on the cargo of the said ship, on his account. The whole cargo of the ship amounted to 103,439 dollars and 54 cents, of which the plaintiff's one-eighth were 12,929 dollars and 94 cents, so that 14,200 dollars would cover the interest of the plaintiff and the premium, &c. The plaintiff directed the supercargo of the ship to apply at Calcutta for a credit for him, and to make a shipment. But the supercargo did not obtain credit, nor make any shipment other than the plaintiff's share above mentioned. The plaintiff claimed for a return of premium, on the

potent to the banker and his customer to agree that the banker shall have a lien on all property on which the customer can lawfully give it, which may come to the hands of the banker; and this agreement may be expressed in words, or may be inferred from the course of trade; but it is not competent for them to agree expressly or in any other manner, that the bankers shall have a lien on the property of other persons on which the customer had no authority to give one.' (*Brandao v. Barnett*, 2 Scott, N. R. 113; *Russ. Fact. & Brok.* 200.) And so it is manifest, that a factor or broker and his principal are not competent to enter into any such agreement." (*Russ. Fact. & Brok.* 201. Consult Mr. Duer's review of *Snook v. Davidson*, *Lanyon v. Blanchard*, *Mauns v. Henderson*, *Mann v. Forrester*, 4 Campb. 60; *Westwood v. Bell*, *Levy v. Bernard*, 8 Taunt. 149; S. C. 2 Moore, 34; and *Foster v. Hoyt*; 2 Duer on Ins. 353-361. See the remarks of Mr. Paley upon *Mann v. Shifner*, 2 East, 593, 599, Agency, 149.)

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difference between the subscription of the defendants and the interest of the plaintiff, amounting to 891 dollars and 52 cents. The ship arrived safe at Baltimore.

S. Jones, jun. for the plaintiff.

Troup, contra.

KENT, J. delivered the opinion of the court. There is no doubt but that if property be insured to a larger amount than the real value, the overplus premium is recoverable by the assured, because the insurer shall not receive the price of a risk which he has not run.^(a)

On the other hand, if the risk has once commenced or existed, there shall not be any return of premium, as the consideration for it has then been given.^(b) (Park, 367.) The recovery in the present case, therefore, depends on the solution of the question, whether the other persons interested in the cargo, could, in case of loss, have covered any part of their interest under this policy. *If [*331] they could not, then the defendants have run no risk beyond the amount of the plaintiff's interest on board; and I think, from the facts before me, that such must be the conclusion of law.

To constitute a partnership, by which the act of one will bind or enure to the benefit of the rest, there must be a reciprocal choice and agreement of the parties to unite their stock, and to share in all risks of profit and loss. (Watson, 1, 5. 1 Doug. 371. 2 Bl. Rep. 998.) They must not only be jointly concerned in the purchase, but jointly concerned in the future sale. (1 H. Bl. 48.)^(c) In the case of *Hoare v. Dawes*, (1 Doug. 371,) a broker was employed by a number of persons to purchase a lot of tea, of which each was to have his separate share; and he purchased the lot of tea for

(a) See 2 Phillips on Insurance, 529, 530; Loccenius, l. 2, c. 5, § 8; *Amery v. Rodgers*, 1 Esp. 207; *Pollock v. Donaldson*, 3 Dallas, 510.

(b) See *supra*, vol. 1, p. 313, n. (a) to *Delavigne v. The United Insurance Co.*

(c) See Story on Part. ed. 1841, p. 47; 3 Kent's Comm. 25, 26; Collyer on Partn. by Perkins, 14-19; *Post v. Kimberly*, 9 Johnson, 470; *Harding v. Foxcroft*, 6 Greenleaf, 76.

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the benefit of his employers; and it was held that they were not partners in the tea, because there was no undertaking by one to advance money for another, nor any agreement to share with one another in the profit or loss. And Lord Mansfield observed that it would be most dangerous if the credit of a person who engages for a fortieth part, for instance, should be considered as bound for all the other parts. And in the case of *Coope and others v. Eyre and others*, (1 H. Bl. 37,) several persons entered into an agreement to purchase a quantity of oil in the name of A. only, and to take *aliquot* shares of the purchase; but as it did not appear that they were jointly to resell the goods, they were held not to be partners. There was no communication between the buyers as to the profit or loss. Each party was to have a distinct share, and to manage it as he judged best; and of consequence, the profit or loss of the one might be more or less than that of the other.

In the present case, there is no evidence of any agreement or communication between the parties as to profit or loss, but what arises as a matter of intendment, from the fact, [*332] that the cargo of the ship belonged to the *plaintiff and four other persons, and was purchased with the proceeds of the outward cargo, which also belonged to the same persons. To repel this inference, we have the other fact found, that the plaintiff carried on business for himself unconnected in trade with the other persons; and that the present insurance was made for himself, and that the other persons had no direction or concern therein.

It is a strong and decisive fact in this case, that there was no agreement between the parties to share in the future sale of the return cargo; and the presumption is directly otherwise since the parties were unconnected in trade. This brings the case within the decision in *Coope and others v. Eyre and others*. The parties were not, in fact, partners, as amongst themselves, nor did they professedly act or appear as such. The plaintiff appears to have acted with candor, and to have directed an insurance on his own account, as interest should appear. The over valuation must have

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originated in mistake, in too high an estimate of the result of the outward cargo, and in the expectation of an additional cargo to be procured on credit at Calcutta.

We are, therefore, of opinion that the plaintiff was not a partner, and that he is consequently entitled to the return of premium, as liquidated in the case.

Judgment for the plaintiff.(d)

(d) As a general proposition, an insurance made by one partner for the benefit of his firm, will be valid to cover the interest of the firm. (Story on Partn. ed. 1841, p. 150, and references in n. (1.) 2 Duer on Ins. 98, 99. 2 Kent's Comm. p. 41. 1 Phillips on Ins. 161. Collyer on Partn., Perkins ed. 438.) But the rule is otherwise where an insurance is made on account of persons who are merely tenants in common or joint owners. In that case, the right of a part owner to insure is limited to his own individual share. (1 Phillips on Insur. 161, *et seq.* 2 Duer on Insur. 99, 157. Abbott on Shipp. 77, n. *Turner v. Burrows*, 5 Wend. 541. S. C. 8 id. 144. *French v. Backhouse*, 5 Burr. 2727. *Bell v. Humphries*, 2 Stark. 345. *Hooper v. Lusby*, 4 Campb. 67. *Foster v. U. S. Ins. Co.* 11 Pickering, 85. Consult Mr. Duer's review of these cases, 2 Ins. 157-160.) Mr. Duer remarks, (2 Ins. 99,) "This distinction between the rights of a partner and of a part owner, is a necessary result of the essential difference in the nature of their respective interests. The interest of a partner is in the entirety of the joint property, and his rights of disposition and control are co-extensive; but the share of a part owner, although undivided, is his distinct property, and consequently, he has the sole power to make or authorize any contract in relation to its disposition or use. The several owners of a ship are generally part owners; but the ship may be in whole or in part partnership property, and when it is so, the right of each partner to make an insurance on the vessel or freight, co-extensive with the interest of the firm, is undoubted. But a part owner has no such right even when he is the managing owner, that is, when the fitting out and employment of the ship are confided to his direction. A ship's husband has no such authority, and it cannot spring from the union in the same person of two characters, to neither of which it separately belongs."

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[*333] *JUHEL AND DELONGUEMERE *against* CHURCH.

A. having chartered a ship to bring a cargo from the Spanish Main to New York, effected a policy of insurance on the *profits*, valued at 12,000 dollars; no other proof of interest to be required but the policy; and if the goods did not arrive, the insured was to recover for a total loss; and the goods were warranted free from average and without benefit of salvage to the insurer. The vessel finding no cargo at the Spanish Main, returned to New York in ballast, without any goods. A. brought an action against the insurer for a return of premium; and it was held, that the insurer having run the risks enumerated in the policy, and the ship having returned in safety, A. was not entitled to a return of premium.

THIS action was brought for a return of premium. At the trial, a verdict was found for the plaintiffs, subject to the opinion of the court, on a case; and if the court should be of opinion against the plaintiffs, a judgment of nonsuit was to be entered.

The plaintiffs chartered the ship *Three Sisters* to bring a cargo of wines from the Spanish Main to New York; and had insured, by a valued policy, 12,000 dollars on goods for the voyage. But although in the printed part of the policy the same was stated to be on goods, yet by a memorandum in writing at the bottom of the policy, it was declared to be on *profits*, and that no other proof of interest was to be required than the policy, and that if the goods did not arrive, the assured was to recover for a total loss, and the same was warranted free from average and without benefit of salvage to the insurer. The ship found no cargo at the Spanish Main, and returned to New York in ballast, without any goods whatever.

B. Livingston, for the plaintiffs.

Pendleton, contra.

KENT, J. I consider this as a wager policy. It has the *indicia* of a wager policy, as they are pointed out by the cases on the subject. (Doug. 468. Park, 259.) Here was to be no other proof of interest required than the policy itself, and if the goods did not arrive the insurer was to pay. It was in fact betting on the return of the ship, and if she

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had not returned, in consequence of any peril enumerated in the policy, the plaintiff would, on its production, have been entitled to the sum insured. *As the [*334] plaintiffs claim a return of premium, it has been made a question whether this be a valid policy. If it be unlawful and consequently void, on the ground of its being a wager policy, the assured is not entitled at any rate to a return of premium, for *in pari delicto potior est conditio possidentis*.^(a) It was so decided in the cases of *Lowry v. Bourdieu*, (Doug. 468,) and *Andre v. Fletcher*, (3 Term Rep. 266.) But supposing the policy to be good, (and I wish not to be understood as intimating any opinion to the contrary,) I am equally of the opinion that the plaintiffs are not entitled to recover, because the defendant has run a risk, which is the consideration for the premium. I consider this policy as amounting to a bet on the return of the ship. If she had not returned, and the plaintiffs could have shown it was in consequence of some peril within the purview of the policy, they must have been entitled, as a matter of course, to the sum insured, without proving any interest or goods on board. The defendant must, therefore, be considered as having run the risk of the ship during the voyage. But as the ship returned in safety, I do not consider him responsible, because the goods did not arrive. It could never have been the meaning of the parties, that whether the ship did or did not arrive, the defendant was at all events to pay the 12,000 dollars. This would be a contract without any reciprocity and altogether absurd. The plaintiffs, by the form of this action, have given a different interpretation to it. The policy enumerates a variety of perils or risks, which the defendant assumed to run; and there must have been some subject to which they could be applied, and this, in the present case, could be no other than the ship. When, therefore, the policy says that no other proof of interest was to be required than the policy, and that if the goods did not arrive, the assured was to recover, its meaning was, that if the ship did not arrive in con-

(a) See Bro. Max. 323.

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sequence of any peril mentioned, the assured was to
 [*335] recover the value of his *profits, without proving
 any goods on board from which the profits were to
 arise.

As the defendant has, therefore, run the risk intended by
 the policy, I see no pretence for a return of premium, and
 judgment of nonsuit ought to be entered.(b)

RADCLIFF, J. and LEWIS, J. were of the same opinion.

LANSING, Ch. J. dissented.

Judgment of nonsuit.

(b) It seems to have been conceded, that *Buchanan v. Ocean Ins. Co.* (6 Cowen, 318,) *Clendenning et al. v. Church*, (3 Caines, 141,) and the principal case, established the validity of wager policies in New York. (1 Duer on Ins. 94. 1 Phillips on Ins. 3, 4. See, however, per Ogden, *arg.* 6 Cowen, 325.) The Revised Statutes, (1 Rev. Statutes, ch. 2, p. 666, § 8, 9, 10,) however declare that "all wagers, bets or stakes, made to depend upon any gaming by bet or chance, or upon any bet, chance, casualty, or unknown or contingent event whatever, shall be unlawful; and that all contracts for or on account of any money or property, or thing in action so wagered, bet, or staked, shall be void." Mr. Duer remarks upon this section of the statute, that "the prohibition is so general in its terms, that it might well be construed to embrace all insurances whatever; but to guard against this construction, insurances made in good faith, for the security or indemnity of the party insured, and not otherwise prohibited by law, are, by a subsequent clause, excepted from its operation." (1 Insurance, 94.) Wager policies are held void in Massachusetts; (*Amory v. Gillman*, 2 Mass. 1; *Babcock v. Thompson*, 3 Pickering, 446;) in Pennsylvania; (*Pritchett v. Ins. Co. of N. A.* 3 Yeates, 464; *Craig v. Murgatroyd*, 4 Yeates, 161; *Adams v. Penn. Ins. Co.* 1 Rawle, 107; *Edgell v. McLaughlin*, 6 Wheaton, 176;) and generally throughout the United States. (1 Duer on Insurance, 95. See 1 Duer on Insurance, (p. 154, 155,) for a construction of the foreign authorities upon this question.

CORPORATION OF NEW YORK *against* DAWSON.

An action for use and occupation is not *local* in its nature, being founded in privity of contract and not in privity of estate.

The *venue* in a cause, in which the corporation of New York was a party, was laid in the city of New York ; and the court refused to change it merely on that account, on the bare allegation that an impartial trial could not be had in the city and county of New York.

THIS was an action of *assumpsit*, for the use and occupation of certain premises at Brooklyn, in King's county. The *venue* was laid in New York, and the defendants moved to change it to Kings. 1. Because, from the declaration, it appeared that the cause of action arose in that county ; and the action, in its nature, is *local*. 2. Because a fair and impartial trial cannot be had in New York.

Evertson, for the defendant.

Harison, contra.

Per Curiam. This action is founded on the privity of contract, and is not local in its nature. It was, therefore, not indispensable to lay the *venue* in Kings. Actions founded on the *privity of estate* are local, as in debt by the *assignee* or *devisee* of the lessor, against the lessee, or by the lessor against the *assignee* of a lease, or in covenant by the *grantee* of the reversion, against the [³³⁶] *assignee* of a lease. (1 Wils. 165. 6 Mod. 194. 1 Salk. 80.) In this case, the action is founded on the privity of contract only, either expressed or implied. It follows that the *venue* is not necessarily controlled by the circumstance of the premises being situated in King's county. (a) It is settled, that in transitory actions the court may, and ought, to change the *venue* for the purpose of an impartial trial. (2 Burr. 1564.) But no special ground is here stated to show that a fair trial cannot be had in New York. The interest supposed to exist in favor of the success of the cor-

(a) See 2 Rev. Statutes of New York, 409 ; But see Code of Procedure, 103-105.

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poration is too uncertain and remote. It is, in truth, seldom, if ever, felt or known ; and an independent jury may as probably be obtained in this as in any other county. It would be extremely inconvenient to change the *venue*, on this formal objection, in all cases in which the corporation may be concerned ; and we think it ought not to be done, unless there appear substantial reasons to support the objection.

Motion denied.(b)

SHUTE *against* DAVIS and another.

A declaration may be amended after a plea in abatement ; but not by adding the name of another defendant, against whom a separate suit was brought for the same demand.

STRONG, for the plaintiff, moved for leave to amend the *capias* and declaration in this cause, by adding the name of another defendant. After the writ was issued against the present defendants, the plaintiff's attorney discovered that T. D. was a partner with them ; and thereupon issued a writ against him to answer together with the present defendants.

The first writ was returnable in January term, and [*337] the other in April term last. In *June, the plaintiff declared against the defendants separately in this suit ; and on the 9th July, against T. D. separately in the other suit. To the declaration in the first suit, there is a plea in abatement, that T. D. ought to have been joined with the present defendants.

Per Curiam. There is no doubt that a declaration may, in many cases, be amended, after a plea in abatement. (1 Str. 11. 2 Ld. Raym. 859, 1472. 2 Str. 739.) But here the plaintiff moves to add another defendant, against whom a second suit has been brought for the same demand. If the plaintiff apprehended a plea in abatement, or wished to make

(b) See *supra*, 116, n. (b) to *Scott v. Gibbs* ; *Graham's Practice*, 2d ed. 564.

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the other defendant a party, he ought to have discontinued the first suit, and commenced another action against all the defendants, instead of bringing a new action against the other defendant. The effect of granting this application would be to allow separate suits against each joint debtor, and afterwards to consolidate them into one, or to unite all the defendants in one suit, and discontinue the others. This is not warranted by any former practice, and might lead to inconvenience and vexation. The motion must be denied.

Rule refused.(a)

REEDY *against* SEIXAS.

There is no particular form of notice to the endorser of a note, prescribed by law. It is enough, if, under all circumstances, it was sufficient to put him on inquiry; and this is properly a question of fact for the jury to decide.

THIS was an action by an endorsee against an endorser of a promissory note. At the trial, the note in question was produced; which was for 1216 dollars and 50 *cents. At the bottom of the note, were the figures [*338] 1216 dollars and 52 cents; and the notary, in the notice given by him to the endorser, of the non-payment, had expressed the latter sum. It was objected, that the notice did not refer to the same note. The judge left it to the jury, whether the note produced and the one described and intended by the notice were the same; and the jury found a verdict for the plaintiff. A motion was now made to set aside the verdict, and for a new trial.

Wilkins, for the plaintiff.

B. Livingston, contra.

Per Curiam. The question was properly left to the jury. The law does not prescribe any form of notice to an endorser. It is not, perhaps, requisite, to specify the amount of

(a) See *supra*, p. 220, n. (b) 12, 13, to *Bogert v. M'Donald*.

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the note. The notice was sufficient to put the defendant on inquiry, and to prepare him to pay it or defend. It is enough if the jury was satisfied that the notice referred to the same note intended by the plaintiff, and was so understood by the defendant. It was incumbent on the defendant to show some uncertainty in the notice, tending to mislead him; as other notes endorsed by him under similar circumstances. The motion must be denied.

Rule refused.(a)

[*339] *HILLDRETH *against* BECKER AND HARVEY.

Where a declaration commenced thus, "James Hilldreth complains of Peter B. and James Harvey, the said James being in custody, &c. and the said Peter being returned not found, of a plea, &c. : it was held to contain sufficient certainty; and that J. Harvey, the defendant, and not James H. the plaintiff, was the person in custody, &c.

THE declaration in this cause was against the defendants jointly on a bond to the sheriff. It commenced thus: "James Hilldreth complains of Peter Becker and James Harvey, the said James being in custody, &c. and the said Peter being returned not found, of a plea," &c.

There was special demurrer to the declaration, because it was uncertain whether James Hilldreth, the plaintiff, or

(a) No particular form of notice is indispensable to charge an endorser, if it contain a description of the note or bill, and an assertion of due presentment and dishonor made in terms sufficiently certain to put the endorser upon his guard. It is not necessary, therefore, that it should state at whose request it was given, nor who is the owner; (*Short v. Brett*, 1 Pick. 401; see *Mills v. Bank of the United States*, 11 Wheaton, 431;) nor that the holder looks to the party notified for payment. (*Cowles v. Harts*, 3 Connecticut, 516.) In confirmation of *Reedy v. Seixas*, see the following authorities:—(*Chitty on Bills*, ed. 1833, p. 501; *Bayley on Bills*, ed. 1830, p. 256; *Story on Bills*, 456; *Ransom v. Mack*, 2 Hill, 587; *Sanger v. Stimpson*, 8 Mass. R. 250; *Bank of U. S. v. Carneal*, 2 Peters, 543; *Shrieve v. Duckham*, 1 Litt. 194; *Smith v. Whiting*, 12 Mass. R. 6; *Bank of Cape Fear v. Seawell*, 2 Hawkes R. 560; *Furze v. Sharwood*, 2 Gale & David. 116.)

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James Harvey, was the person alleged to be in custody ; and because it is not stated that any process issued in the suit, by virtue of which Peter Becker was returned not found, &c.

Per Curiam. In a declaration, certainty to a common intent is sufficient. (Cowp. 682.) It is like the case of *Connor v. Connor*, (2 Wils. 386,) where John Connor, of Friday street, declared on a bond against John Connor, of Barnett, but the addition to the defendant's name was not repeated afterwards in the declaration, and the defendant, after craving *oyer*, demurred specially, because it did not appear which John Connor executed the bond ; but the court decided that there was sufficient certainty appearing on the record that John Connor, of Barnett, was indebted on a bond to John Connor, of Friday street, and gave judgment for the plaintiff. So in the present case, it appears with sufficient certainty, that James Harvey executed a bond to James Hildreth, and as James Hildreth complains thereon of James Harvey, it must be intended that the latter is the person in custody.

This is a proceeding according to the provision in the act, in regard to joint debtors, (see 24 sess. c. 90, s. 13,) "that the creditor may issue process against joint debtors, in the manner now in use ; and in case any of such joint debtors be taken, and brought *into court, he or they [*340] so taken and brought into court shall answer to the plaintiff ; and in case judgment shall pass for the plaintiff, he shall have his judgment on execution, against such of them as were brought into court, and against the other joint debtors named in the process, in the same manner as if they had all been taken and brought into court, by virtue of such process," &c. The defendants in the present case were joint debtors, and the plaintiff declares against both of them in the same manner as if both had been taken ; and only one was taken and brought into court. It appears certain, to a general intent, from the facts and the averment, that one defendant was in custody and the other returned not found ; that process did issue in the suit, and that by *virtue thereof*, one

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of the defendants was returned not found. Pleadings are to receive, if the words will admit it, a reasonable intendment, and are to be construed *secundum subjectam materiam*. There must be judgment for the plaintiff.(a)

Judgment for the plaintiff.

TREADWELL, Assignee, &c. against M'KEEL and others.

Bail to the sheriff are responsible only for the principal and interest due on the bond in the original suit, and not for any matters *dehors* the condition for which the penalty is claimed as security.

THIS was a suit on a bail-bond, in which judgment was obtained. The original suit was on a bond conditioned for the payment of money.

Riker, for the defendants, now moved that they be discharged from this judgment, on payment of the amount of the bond in the original suit, with the costs of both suits.

[*341] **Evertson*, contra, stated, that the principal defendant and one Whitney entered into an agreement for the sale and purchase of the defendants' farm, on which there was a mortgage, to secure the payment of the bond in question; and Whitney engaged to take up that bond, and another bond against the defendant, which he did.

(a) See Stephens on Pleading, Am. ed. 1837, 380; 1 Chitty's Pleading, Am. ed. 1828, 249, 250, 254, *et seq.* The Code of Procedure of New York requires that "the complaint," (or declaration) shall contain 1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant. 2. A statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. 3. A demand of the relief, to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated. (Code of Procedure, § 120.)

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The principal defendant having refused to fulfil his agreement, Whitney has resorted to the court of chancery to compel a specific performance, or a return of all the money he has paid ; and has also brought the principal suit on the bond in the name of the original obligee from whom he received it, as assignee. He also stated that the bail were colluding with the principal defendant, and that one of them has taken possession of the farm, so agreed to be sold to Whitney.

On these facts, which were admitted, he contended, that the plaintiff had a right to the penalty of the bond in the original suit.

Per Curiam. We are of opinion that the bail to the arrest are only responsible for the principal sum and interest of the bond on which the defendant was arrested. It would be of dangerous consequence, and deter persons from becoming bail to the sheriff, to extend their responsibility further. It is settled in England, (Str. 922,) that special bail can never be made liable for more than they are bound in, let the plaintiff's demand be ever so much more ; and there is no reason that bail to the arrest should be liable for more than the plaintiff would be on becoming bail to the action. On bonds conditioned for the payment of money, the plaintiff can never recover, under the penalty, any debt or demand, however just, beyond the amount of the condition. The statute declares that on bringing the principal, interest and costs into court, it shall be deemed, in favor of the defendant, a full discharge of the bond. The equitable jurisdiction of the courts of law over the bail-bond suit, cannot *be [*342] extended to other matters *dehors* the original suit. The offer of the present defendants must, therefore, be received and the motion granted.

Motion granted.(a)

(a) See Graham's Practice, 2d ed. 175 ; 1 Graham's Practice, 3d ed. 565, 566. See Code of Procedure of New York, § 162, *et seq.*

The People v. Thompson.

THE PEOPLE *against* THOMPSON.

Forging the following order: "Sir, the bearer, Mr. Richardson, being our particular friend, having occasion, &c. we have requested him to call on you, desiring you to accept his draft on us, on demand for 15 dollars; your compliance will much oblige," &c. is not forging an order for the payment of money within the statute. But see a subsequent statute, (24 sess. c. 54,) by which it is declared to be forgery.

THE prisoner was convicted of forging and uttering an order for the payment of money. The paper set forth in the indictment was as follows: "New-Port, 15th July, 1801. Captain Godfrey, sir, The bearer, Mr. Richardson, being our particular friend, who has occasion to proceed from New York to Philadelphia, we have requested him to call on you, desiring you to accept his draft on us, on demand, for fifteen dollars; your compliance will much oblige, sir,

Your humble servants,

GIBBS AND CHANNING."

W. Morton, in behalf of the prisoner, now moved in arrest of judgment, on the ground, 1. That the paper set forth in the indictment, is not an order for the payment of money, within the statute. 2. That it does not appear in the paper, nor is it averred in the indictment, that Gibbs and Channing had any authority to make the order.

Colden, District Attorney, contra.

Per Curiam. Admitting the paper to be an order for the payment of money, it is not an order of the kind intended by the act. It has long been settled in England, upon a similar statute, that the order within its purview, [*343] "must be one importing a *right* on the part of the person who is supposed to have made it, and a *duty* on the part of the person on whom it is made: (1 Leach, 111, note.) That where it seems to leave compliance or refusal *optional*, and applies rather to the *favor* than the *justice* of the person on whom it is drawn, it is not within the statute, as not being an order on which the party taking it can place any reliance. It is the usurpation of another's

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right which the legislature intended to punish and prevent. In *Mitchell's case*, (Fost. 19,) the order was, "I desire you to let A. have, &c. and I will see it paid for." So in the case of George Williams, (1 Leach, 134,) the order was, "please to let the bearer have twelve barrels of tar, and you will oblige," &c. In the case of Eller, (1 Leach, 365,) the order was, "please to send ten pounds by the bearer, as I am so ill I cannot wait on you;" and in *Church's case*, (2 Leach, 615,) the order was, "please to send by the bearer eight pounds of silk." In all these cases it was ruled that the order was not within the act, because it did not purport to be the order of a person who had, or assumed to have *authority* to make it.

In the present case, there is no pretence of *right* in Gibbs and Channing to make the order. It is a mere request as a favor. It states the bearer to be their *particular friend*, and had occasion to go to Philadelphia; which circumstances are totally idle, unless to fortify the application *for a favor*. It says, we requested him to call on you, *desiring* you to accept, &c. *your compliance will much oblige*, &c. The whole is matter of *favor*, and not the usurpation of a *right*; and according to the English decisions, we must declare, that this is not an order for the payment of money within the meaning of the statute.

The legislature of this state have been sensible of this construction and have accordingly, on the revision of the statute relative to forgery, which will go into operation *in October, amended the act so as to extend [*344] it to orders, purporting to be made without, as well as with right or authority, in the person whose name may be forged. But the act, thus amended, cannot now help the present indictment. We are, therefore, of opinion that the judgment ought to be arrested.

Judgment arrested.(a)

(a) The Revised Statutes of New York provide that "every person who, with intent to injure or defraud, shall falsely make, alter, forge, or counterfeit any instrument or writing, being, or purporting to be, the act of another, by which any pecuniary demand or obligation shall be, or shall purport to be, created, increased, discharged or diminished, or by which any rights or proper-

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ty whatever, shall be, or purport to be, transferred, conveyed, discharged, diminished or in any manner affected, the punishment of which is not hereinbefore prescribed : by which false making, forging, altering or counterfeiting, any person may be affected, bound, or in any way injured in his person or property, upon conviction thereof, shall be adjudged guilty of forgery in the third degree. (2 R. Stat. 2d ed. p. 560, § 33. See also id. § 32.) The principal case, however, arose upon a statute similar to 7 Geo. II. c. 22, (see also 11 Geo. IV. and 1 Will. IV. c. 66,) within which Mr. Chitty observes, (3 Chit. Crim. Law, Am. ed. of 1832, p. 1033,) "it has been holden that the document forged, must be such as appears to give to the bearer a disposing power over the property which he demands ; it must assume to transfer the right at least of the custody of the goods to the offender ; and not be a mere request to a third person to deliver the articles in question which he may evidently refuse if he pleases. (Fost. 119.) But in general, the essence of the crime does not consist in the order being such as not only supposes the right in the party supposed to make it, but as will appear to the party to whom it is directed, to throw on him the duty of compliance. It is sufficient if it assume on the face of it, to be an instrument of this kind. The distinction is, that when an order is so drawn as to induce a belief in the person to whom it is uttered, that it will be complied with, the offence is within the act, though it could not deceive the party to whom it is drawn ; but if it seems to have the compliance optional, and applies rather to the favor than the justice of the person to whom it is addressed, it is not within the meaning of the statute, because the individual taking it can place no reliance on its credit. (1 Leach, 95, in *notis*.) Thus, a note as from an overseer of the poor to a tradesman, desiring him to deliver goods to the prisoner, is not an object of forgery within the act. (Fost. 119.) So where the prisoner drew a bill, '*Please to pay on demand 15l.*' and signed it with his own name, but it was not addressed to any one, there were forged upon this instrument, when uttered, the words and signature, '*Payable at Messrs. Masterman & Co. White Heart-court. William M'Inerheny.*' M'Inerheny kept cash at Masterman & Co.'s who were bankers ; the judges held that this was not an order for payment of money, there being no special averments in the indictment that this was intended for an order, or that Masterman & Co. were bankers. (Russ. & Ry. C. C. 161.)

An order drawn in the name of another in these words, "Messrs. D. & D. please to let the bearer trade ten dollars out of your store, and oblige yours," &c. has been held a forgery within the Connecticut statute ; (*State v. Cooper*, 5 Day, 250 ;) and an order so drawn in the following words, "Mr. S., Sir, let the bearer trade thirteen dollars twenty-five cents, and you will oblige," &c. has been held within the New York Statute, *sess.* 24, c. 54 ; (*People v. Shaw*, 5 Johnson, 236 ;) and in Massachusetts, an order in these words, "Mr. P., Sir, deliver my son one pair of walking shoes, and charge the same to me, yours, J. F." has been held within their statute. (*Commonwealth v. Fisher*, 17 Mass. R. 46. See further, *Ames case*, 2 Greenleaf, 265. *People v. Farrington*, 14 Johns. R. 348. *People v. Finch*, 5 id. 237. *Foulker's case*, 2 Robinson, 836. Barbour's Ma. Crim. Law, 101, 102, 108. Stephens' Criminal Law, 207.)

The case of Peters, an Indian.

THE CASE OF GEORGE PETERS, A BROTHERTOWN
INDIAN.

The Brothertown Indians are subject to the civil and criminal jurisdiction of this state.

GEORGE PETERS, a Brothertown Indian, was convicted at the last oyer and terminer, held in Oneida county, of the murder of his wife, who was also an Indian. The murder was committed in the village of Rome. The Brothertown Indians reside in the town of Paris ; and the teacher of the tribe attended at the trial.

The question submitted to the consideration of the court was, whether the prisoner was amenable to the laws of this state for the crime.

Per Curiam. The Brothertown Indians are not a distinct nation or tribe. They came from New England, and settled under the jurisdiction of this state. They have never claimed or exercised any criminal jurisdiction among themselves. What civil jurisdiction they exercise, is under the several acts of the legislature which have been made for their civil government ; and they have never been considered or treated as an independent tribe. They are not, in this respect, like some of the Indian tribes within this state, whose situation is peculiar, and who, as to offences committed by the individuals within their tribes against each other, have *claimed and exercised a criminal jurisdic- [*345] tion. But without giving any opinion what would be the case with respect to other Indians, we think that the Brothertown Indians are clearly subject to our laws, and to the jurisdiction of this court.

END OF JULY TERM.

CASES
ADJUDGED IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW YORK,

IN OCTOBER TERM, IN THE YEAR 1801.

[On Wednesday the 28th October, LANSING, Ch. J. was appointed CHANCELLOR
and LEWIS, J. was appointed CHIEF JUSTICE in his stead.]

PALMER, *qui tam*, &c. against DONEY.

In an action *qui tam* for the penalty given by the tavern act, for retailing strong liquors, without a license : it was held, that a license granted by two of the commissioners of the excise, without the presence or consent of the supervisor, and when they were not assembled for the purpose of granting licenses, was illegal and void ; and such a license, though regular on the face of it, is no justification of the tavern-keeper, who is liable for the penalty.

But a tavern-keeper who has a legal and competent license, is not liable for the penalty, for retailing liquors after his license has expired, and before the time of the next meeting of the commissioners of excise, for the purpose of granting licenses.

THIS was an action of *debt*, for several penalties alleged to be incurred under the act to lay a duty of excise on strong liquors, and for the better regulating inns and taverns.

The defendant, on the 8th day of April, 1799, applied to the plaintiff, who was supervisor of the town of Ballstown, and two justices, White and Waters, then sitting as commis-

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sioners under the act, for a license to retail spirituous liquors, for the purpose of keeping *an inn or tavern. The defendant paid White, one of the justices, five dollars, the sum required for such license; who, without the assent of the other commissioners, received the same and paid it over to the overseers of the poor of the town. The two justices had given the defendant encouragement to expect a license, but the plaintiff and Waters afterwards refused it. The defendant sold liquors both before and after the 8th day of April. On the 3d day of May ensuing, the plaintiff, with White and Ball, justices, being met to canvass the votes taken at the preceding election for senators, &c. the defendant renewed his application, which was rejected by the plaintiff, on the ground that they were not then assembled as commissioners under the act. But White and Ball retired into another room, and gave the license required. The judge who tried the cause suffered the license, though objected to, to be given in evidence, and charged the jury that though irregularly obtained, it was sufficient to protect the defendant as a third person, and that it should, by relation, be considered as having been given on the 8th day of April preceding; and that, as there had been no board of commissioners between the 1st day of March, (on which day all permits expired,) and the 8th day of April, the defendant was justified, *ex necessitate*, in continuing to retail spirituous liquors during such interval. They accordingly gave a verdict for the defendant.

The plaintiff now moved to set aside this verdict, on the ground of a misdirection.

Woodworth, for the plaintiff.

Foot, contra.

LEWIS, J. delivered the opinion of the court. This prosecution appears to be a hard one against the defendant. [*348] *Having paid for a license, and two magistrates having considered him properly qualified for an innholder, we are at a loss to discover the motive of it. On the argument, I thought the law with the defendant, on all the points raised; and could my opinion be controlled by

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my wishes, I should think so still. But on reflection and examination, we all believe the charge to be incorrect in one important particular, and the verdict of course wrong. The point to which I allude is the protection set up under the license of the 3d of May, which we do not consider such as the act requires. Two questions arise: 1. Is the license a legal one? 2. If not, is the defendant nevertheless protected by it? By the second clause of the act, the authority is given to the supervisor and any two justices; and by the proviso to the same clause, no license is to be granted unless three commissioners shall be present *at the granting thereof*. Now it is stated in the case, that White and Ball retired from the room where the supervisor was, and signed and delivered the license, &c. Three commissioners then were not present at this part of the ceremony, and it does not appear that even a majority, when the three were together, granted, or even agreed to grant a license; so that the act has in no way been complied with.(a)

Another objection is, that Ball does not appear, from the case, to have been legally a commissioner of excise for that year. For the jurisdiction is vested in the supervisor and any two justices; and of course, though every justice resident within the town, might, perhaps, have attended the first meeting; yet as White and Waters only did attend with the supervisor, the jurisdiction attached exclusively to them. (4 Term Rep. 451.)

One further objection occurs: It is at least a question whether any jurisdiction of excise vests in the justices, until noticed by, and associated with, the supervisor. This is certainly the case, where, for default of resident justices, others are to be resorted to. Now it does not appear [349] that Ball resided within the town, or was ever

(a) Where a public act is to be done by commissioners appointed under a statute, and a competent number have met and conferred, though they separate, and then a majority do the act, without the presence of the other, the act seems good in construction of law, though it is otherwise where there is a positive statute or charter requiring that a full board should be present at the consummation. (See an elaborate examination of this subject by the late Mr. Justice Cowen, 7 Cowen's Rep. 530, n. (a) to *Ex parte Rogers*.)

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notified by, and associated with, the supervisor; and the presumption is against it from his not having attended the first meeting. If either of these reasons be sound, the license set up as a justification, is illegal, from a want of authority to grant it; and the only remaining question is, whether it was, notwithstanding, a competent defence to the defendant. If the objection to it rested on the ground of irregularity alone, its incompetence might be doubted; but it goes to a want of a jurisdiction or power to grant in the justices who signed it; and the defendant is certainly liable to the penalty, if his license is not derived from the competent authority. He knew all the circumstances, and the precise situation in which the two magistrates who signed the license stood; and he is bound to know that his license is derived from a pure and legal source, before he acts under it; at least, there ought to be strong color of right on his side. In the case of *Calcraft v. Gibbs*, (5 Term Rep. 19,) on a penalty under the game laws, a verdict for the defendants was set aside, on the principle that the power of appointing a gamekeeper is inseparable from a manor; though it was shown by Gibbs that he was appointed gamekeeper by Roebuck, who had purchased an estate in the manor, and had stipulated for the deputation with the plaintiff, who was lord of the manor.(b)

(b) In *Goff v. Fowler*, (3 Pickering, 300,) an action of debt was brought for penalties alleged to have been incurred by the defendant under the statute of 1786, ch. 68, regulating licensed houses. It appeared that the defendant was licensed as an innholder, but the plaintiff insisted that the license was void, because the certificate of the selectmen of Rehoboth did not conform to the statute, (§ 2,) but merely recommended the defendant "as being a suitable person to receive a license." Upon these facts, Chief Justice Parker observes:—"The objection to the license on the ground that the certificate of the selectmen was not conformable to the statute, we think ought not to prevail. The act of the court of sessions, in granting the license, is, we think, conclusive, and ought not to be vacated on account of the informality of anterior proceedings. It is the duty of that court to inspect such certificates and adjudicate thereon, and they are the proper judges of their sufficiency. It would be laying a snare for persons who obtain a license and pay the excise thereon, to leave them subject to prosecution for keeping an inn without license, by allowing any informer to unravel the proceedings of the court in order to detect some irregularity therein." In *Commonwealth v. Bolkom*, (3 Pickering, 281,) the attorney general offered in evidence a book purporting to

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We are, therefore, of opinion, that the verdict must be set aside, and a new trial awarded ; but that on such trial no testimony of any forfeiture previous to the meeting of the commissioners on the 8th of April be admitted ; for public inns being for the public convenience, a traveller is not to be

be the book of records of the court of sessions of the county of Bristol, and kept by the clerk of that court, in which, under the head of "Licenses, September term, 1823," was entered the name of the defendant, with the names of his sureties in the recognizance required by law. The defendant objected to this evidence, until it were proved by record evidence or otherwise, that the defendant had previously been approved of by the selectmen, or upon their unreasonable refusal to give their approbation, had made application for a license. The objection was overruled, and upon a consideration of the question by the court, they say :—"It is objected that it does not appear that the judges proceeded upon a certificate of the selectmen, &c. It was not necessary that it should appear upon the record itself, and as in many other cases of limited jurisdiction, it is to be presumed, since the judges have granted the license, that they had proper evidence before them."

But although mere irregularities, not affecting the jurisdiction of the board or officer granting the license, will not invalidate it, yet the act of licensing must be regular in itself. Indeed this seems essential to the jurisdiction of the board or officer, for a jurisdiction to grant one kind of license is not a jurisdiction to grant another. In *Lawrence v. Gracy*, (11 Johnson, 179,) the defendant was sued under the act of 7th April, 1801, (1 Rev. L. 176,) for retailing spirituous liquors without license, and he proved, in justification, that he paid the supervisor of the town six dollars for the license, and that the license or permission to sell liquor was *by parol*. Upon this the court held, that "the statute requires the license to be in writing, under the hand and seal of the respective commissioners authorized to grant the same. The clause under which this suit is brought declares, that if any person shall sell by retail, any strong or spirituous liquors, without having such license as *aforesaid*, &c. he shall forfeit the sum of twenty-five dollars. The license proved by the defendant was not such a one as the act requires. The evidence of a *parol* license ought not, therefore, to have been received, and could not amount to an authority to sell liquors."

In *Furman v. Knapp*, (19 Johnson, 243,) it was proved that the defendant had been duly licensed to sell liquor by the mayor of the city of New York, but that he had not taken out a license from the commissioner of excise, which he was required to do under the act, (1 Rev. L. 176,) and the court held, that inasmuch as the charter of the city of New York requires a license from the mayor, and the statute requires a license from the commissioner also, the defendant should have obtained both. (See *Stokes v. Prescott*, 4 B. Munroe, 37. *Godfrey v. The State*, 5 Blackf. 151. *Alger v. Weston*, 14 Johnson, 231. *Barnes v. Commonwealth*, 2 Dana, 388.)

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barred the necessary refreshments they afford from the neglect of public officers.

New trial granted.

[*350] *JACKSON *ex dem.* STAATS and others *against*
CAREY.

What is the true construction of the patent of Springfield? The third course given in the description is to be run so as to strike the Otsego lake at the nearest point, at the distance given, without regard to the course taken, and so as to preserve the subsequent course.

THIS was an action of *ejectment* for lands in the county of Otsego.

The lessor of the plaintiff claimed the premises in question, which lie in the county of Otsego, as being within the bounds of the patent of Springfield; and the case turned on the construction of that patent. The words of the patent material in the present instance are as follows: "All that certain tract, &c. on the south side of the Mohawk river, and on the bank of a lake, &c. beginning at a black oak tree, &c. and runs thence N. 61 deg. E. 110 ch., thence N. 60 deg. W. 464 ch., thence S. 30 deg. W. 450 ch. to the aforesaid lake, then along the banks of the said lake, easterly and southerly, to a large birch tree, &c. at which tree, a point of land, jutting into the lake, bears from it N. 35 deg. W., thence N. 72 deg. E. 298 ch. to the W. corner of the land granted to John Lindsley and others; then along the same N. 37 deg. and 40 m. E. 239 ch. to the place of *beginning*." The only question was, as to the manner of running the third course of the patent. If the line should be run according to the course and distance, it would not strike the lake within 30 chains, but terminate at that distance north of the lake. If the line be run, so as to touch the lake without regarding the distance, with the least variation from the course, the premises, or a part thereof will be included within the

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bounds of the patent. If the line be run according to the course and distance, and then a line as nearly east as might be, is run to the lake, or if the line be run so as to strike the lake at the nearest distance from the third station, a small part (if any) of the premises will be included. If after running the third line according to the course and distance, a line be run from its termination, so as to [351] come to the lake at the shortest distance, and upon a south-easterly course, then the premises will be included within such lines. It was agreed, that a survey should be made upon such principles as the court might direct, and if any part of the premises be included therein, the plaintiff was to have judgment for such part.

Hamilton and Spencer, for the plaintiff.

Harrison, contra.

Per Curiam. The plaintiff claims under the patent of Springfield, and the question between the parties depends on the just construction of that patent, in respect to one of its boundaries. The line in controversy is susceptible of being variously run, so as to exclude wholly, or to comprehend different parts of the premises. The parties have agreed to adopt the mode of survey directed by the court, and the plaintiff is to have judgment or not, according to the result. The first station given in the patent is not disputed. Its boundaries from thence are described by courses and distances, without any certain or natural monument until they come to the line in question. This line is also given by a course and distance, but is to run to Lake Otsego. The words are "thence south 30 degrees, west 450 chains to the aforesaid lake." It is found that the course thus given will run wide of the lake, and different modes of ascertaining the line have been suggested. One is to depart from the course so far as is necessary to strike the object with the least deviation, which would carry the line to the north-western extremity of the lake; another is, to run to a station at the lake, which would exactly correspond with the distance of chains; a third is, to run to the nearest point in the northern extension of the lake; and a fourth is, to run

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[*352] *the course and distance as given, and to close by a supplementary line.

It is evident that a single line was here intended, and it was supposed this line, when run according to the course and distance expressed in the patent would reach the lake. The particular situation of the premises in relation to the lake was probably not well understood; but the lake was the *terminus ad quem*, the defined object which the line was intended to reach. In order to carry this intent into effect, we must exclude the idea of a supplementary line, and pursue a single course to the lake. For this purpose, a deviation from the course is unavoidable. The least possible variation in order to touch the lake, would exceed three degrees, and would then strike the lake on its western instead of its northern extent. This could not have been intended, for it does not comport with the general position of the lake as viewed from the preceding station, and would require the next line to extend northerly, instead of running *easterly and south-easterly along the banks of the lake*, as described in the patent. It is therefore necessary to incline the course still further to the east; and the most material question is, whether it shall be drawn to its north-western extremity, or to that station which will correspond with the distance of chains. In determining on either of those stations, the deviation from the course given, does not appear to be the most important consideration. The magnetic course is subject to greater variation, and perhaps the most uncertain of any criterion that can be given. In the present case it must have been wholly mistaken, and must necessarily be abandoned to an extent which renders it no longer any sort of guide. Rejecting the *course*, and considering the lake as the great and natural object intended, no station appears to me more probable than the one which corresponds with the distance of chains. Its position is nearly central on the

[*353] northern bank of the *lake, as opposite to the preceding station, and as likely to have been in view from thence as any that can be named. It agrees with the number of chains, and in this respect conforms more than any

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other to the description in the patent ; and on the whole, in a case attended with so much uncertainty, no construction appears more equitable and probably more consistent with the intent of the grant. Another course, running to the nearest station approaching the north-eastern extremity of the lake has also been proposed, but there appears to be no circumstance which entitles it to a preference. It deviates from both course and distance, and its general position with reference to the previous station seems less probable than the one already mentioned. We are, therefore, of opinion, under all the circumstances, that the line in question ought to be run to the station at the lake, (marked F. on the map accompanying the case,) which agrees with the number of chains, and more than any other with the description in the patent, and the probable intent of the grant.

Judgment accordingly.

JACKSON *ex dem.* VIELY AND CLARK *against* CUERDEN.

Where A., who had been many years in possession of land under B, the supposed proprietor, applied afterwards to C. as the real owner, to purchase, and requested to be considered as tenant ; in an action of ejectment by C. against A. it was held, that A. might show that he made the application under a mistake, and prove a title out of C. though he could not set up an adverse possession of twenty years.

A. was not tenant to C. so as to be entitled to a notice to quit.

THIS was an action of ejectment for lands in Saratoga county ; and was tried at the June circuit in 1800.

The plaintiff gave in evidence a letter written by the defendant to Mary Clark, one of the lessors of the *plaintiff, dated at Half-Moon, the 4th September, [*354] 1797, in which he informs her that "he is in possession of a piece of land, which appears from the map to be hers, and which he had occupied, in company with one Rogers, for a number of years, under Mr. Gansevoort as soil-

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owner. That as it then appeared to belong to her and Mr. Daniel Campbell, he had purchased Campbell's part at six dollars per acre, and was willing to pay her immediately at the same rate for hers, which was, he believed, between 40 and 50 acres. He hopes she will consider him and the widow Rogers as the tenants in possession, as they wished to pay her for the soil as high as any other person," &c.

The plaintiff further proved, that the defendant confessed he was in possession of some lands claimed by the widow Clark, but said he went into possession under the Half-Moon title, and that in 1795, the defendant offered to purchase the land of an agent of the widow Clark. That before and after the offer to purchase of the agent, and before and after the writing of the said letter, the defendant claimed under the Half-Moon patent, and that Viely, one of the lessors, to whom Mary Clark conveyed the premises in October, 1797, had, in May or June, 1798, before bringing the suit, ordered the defendant to leave the premises.

The defendant then offered to give evidence of more than 20 years adverse possession in himself; but it was overruled by the judge, who said that the defendant, by his letter, was a tenant, and could set up no title. The defendant then objected to the want of six months notice to quit, which point was reserved.

Emott, for the plaintiff.

Foot, contra.

[*355] **Per Curiam*. The letter of the defendant was sufficient, *prima facie*, for the plaintiff to recover; but it did not make the defendant a tenant to the plaintiff. The defendant only wished to be deemed the tenant in possession, or, in other words, the occupier, having the equitable right of pre-emption. This was sufficient evidence to enable the plaintiff to recover; but, on the other hand, the defendant was not precluded from showing that he grounded his letter on a mistake, or that the fee existed in himself, or out of the plaintiff. He might be precluded from setting up twenty years adverse possession, for that is only setting up the statute of limitations; and his acknowledgment by his

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letter takes away the statute. (Bull. N. P. 104.) The idea of notice is inapplicable. Here was no tenancy, but an adverse holding. (Cowp. 622.)

A new trial must be granted, for the misdirection of the judge.

New trial granted.(a)

 VAN SCHAICK *against* EDWARDS.

A. residing in the state of Massachusetts, and owning lands in this state, entered into a contract in that state, with B. residing in this state, for the sale of lands to him. B. gave A. his bond for the consideration money payable in four years, and also four promissory notes, payable in one, two, three and four years, for the interest on the bond, at the rate of six and a half per cent. and A. executed a bond to B. conditioned to execute to him a conveyance for the land, on payment of the bond and notes. An action was brought by A. against B. in this court, on three of the notes, to which the defendant pleaded usury. Whether the notes were usurious? *Quære.* And whether the law of Massachusetts or of this state is to govern? *Quære.*

THIS was an action of *assumpsit* on three promissory notes. The defendant pleaded *usury*. The cause was tried at the Albany circuit in September, 1800, before Mr. Justice Benson.

*The plaintiff being seised of certain lands in the [*356] county of Tioga in this state, on the 1st day of July, 1796, at Pittsfield, in Massachusetts, sold the same to the defendant, and in consideration thereof took his bond for 1228 dollars and 50 cents, payable in four years, and four promissory notes for 25 pounds each, lawful money of Massachusetts, payable in one, two, three and four years; and the plaintiff thereupon executed a bond to the defendant, conditioned to convey the land to the defendant, upon his paying

(a) See Tillinghast's Adams on Ejectment, ed. 1846, pp. 33, 56, 105, 275, notes.

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the bond and notes. The notes were given for interest, on the principal sum mentioned in the bond, from the time of sale until the time limited for payment, at the rate of six and a half per cent.

The plea of *usury* set forth the statute of Massachusetts of the 16th of March, 1784, which declares void all contracts for the payment of any principal or money lent, upon a greater interest than six per cent.

The plaintiff, at the time of making the notes, resided, and now resides, at Pittsfield, in the state of Massachusetts, and the defendant in Tioga county, in this state, where the lands lie.

At the time of making the notes, the defendant insisted that the interest should be calculated at six per cent. being the lawful interest of Massachusetts; but the plaintiff urged, that as the lands were situated in the state of New York, he ought to be allowed seven per cent. the lawful interest of this state; and the interest was finally calculated at six and a half per cent. A verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the above facts.

Harison, for the plaintiff.

Emott, contra.

RADCLIFF, J. The plaintiff has declared on the three notes separately, and in another count, on an *insimul computassent*; to each of the counts on the note the defendant has pleaded the statute of Massachusetts against usury, and the general issue to the last count. Two questions have been raised.

1. Whether the statute of Massachusetts applies to the case of a *bona fide* sale of lands, where there is no actual loan of money?

2. Whether the contract, being in Massachusetts, relative to lands in this state, ought not, under the circumstances of the case, to be governed by the law of this state?

Another question, relative to a variance between the evidence and the plea, was made on the argument; but I under-

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stand this objection has been relinquished, and that the parties expect a decision on the merits.

In what light the statute of Massachusetts against usury is considered in the courts of that state, has not been shown. We have not, therefore, the benefit of their decisions, and are left to adopt our own construction. It has been stated to be less extensive in its operation than our own or the English statutes; but on examination, I do not perceive any essential difference. They all profess the same object, and are expressed in terms equally significant and comprehensive. I shall, therefore, consider them as susceptible of the same application.

On the first question, I have no doubt that the statute applies to existing *debts* as well as to immediate *loans* of money; and equally so whether such debts have arisen from the sale of lands, or from any other source. The statute itself speaks only of loans; but the forbearance or giving time of payment for a debt, is in substance a loan. It cannot be material whether the money or its value be thus lent, or has been previously received. There appears to have been no controversy on this point, in the cases that have been cited. They relate principally to the question, whether a loan was masked under cover of a sale, not whether a debt arising from a sale might be the subject of usury. [*359] Usury is defined to be the taking of more than the law allows upon a loan, or for the forbearance of a debt. (1 Vesey, jun. 531.) In the case of *Dewar v. Span*, (3 Term Rep. 425,) the forbearance of a debt arising from the sale of a real estate, in consideration of interest at six per cent. was held to be usurious.

The inquiry in the present case, therefore, is, whether the contract created a debt, and whether, for the forbearance of that debt, more than lawful interest was reserved.

The plaintiff sold to the defendant two tracts of land, for which the latter undertook to pay a stipulated price. The value of the land was agreed upon and ascertained, and a bond executed for the amount. Although the contract was still executory as to some of its objects, this immediately con-

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stituted a debt due from the defendant, to be paid *in futuro*. For the forbearance of this debt, the notes on which this action was brought were given. If the interest reserved on these notes was unlawful, the contract was usurious, and void by the law of Massachusetts.

On the second point, the general rule of the *lex loci contractus*, if applicable to the case, is fully settled, and has become a principle of universal law in the construction of all contracts. The reason of the rule I apprehend to be, that the parties are considered to have in view the law of the country where the contract is made, and in many cases are bound to be governed by it. It would, therefore, be unjust to invalidate this engagement, or alter its operation or extent, by the law of any other country. If no circumstances attend the present case to take it out of this rule, there will be an end to the question, as far as respects the validity of the notes, by the law of Massachusetts. But it is certain that circumstances may exist, arising from the situation [*359] of the parties, the nature of the transaction, or the object of the contract, essentially to vary the rule.

Thus, in the case of *Bland v. Robinson*, (3 Burr. 1077,) a bill of exchange drawn in France and made payable in England, was held to be governed, not by the law of France, but by the English law. So on the question of interest, where a bond was executed in England and sent over to Ireland, conditioned to be paid there, without specifying the rate of interest, it was held to carry Irish interest. (Prec. in Ch. 128.) In these cases the place of performance was made the criterion by which to discover the sense of the parties, and ascertain the law of the country which should govern. In another case, (2 Atk. 372,) where the debt was contracted in England, and a bond to secure the payment given in Ireland, Irish interest was allowed; and Lord Hardwicke there observed, that the debt must be considered as referable to the place where the security was made; or who would lend money upon Irish security?

But in cases, (1 Vesey, 427; 3 Atk. 727; Powell on Cont. 421,) where the contract for the debt, and the security, were

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both made in England, although the security was taken on an estate in the colonies, it was held, in order to prevent an opportunity of evading the statutes against usury, that no more than English interest could be reserved. This occasioned the statute of 14 Geo. III. which declared that such securities should be valid, although they reserved more than English interest, if they did not exceed the interest of the place where the property was situated. The rule adopted previous to this statute, although, perhaps, originally questionable in itself, has been since confirmed by the English decisions in other cases, and still prevails, particularly in relation to personal contracts.

The residence of the parties has also been regarded with a view to this subject. In the case of *Phipps v. The Earl of Anglesea*, (3 Vin. 209, pl. 8,) where portions *were secured by a marriage settlement and by will, [*360] both of which were made in England, but the portions charged on an estate in Ireland, Lord Parker decreed, that as the contract and will were made in England, and all parties resided there, the money should be paid into court with English interest, and without deducting the charges of return from Ireland.

From these cases it appears, that where the contract is to be performed, or the interest is to be paid, or the security to be taken in another place, deviations from the rule have been admitted, and the law of that place adopted. The residence of the parties alone has not been regarded as decisive; but it has its weight, in order to show their probable intent, and the law of the country they had in view. In the present case it is admitted, that the defendant resided in this state and the plaintiff in Massachusetts. Their residence alone could not, therefore, form a criterion, if it was otherwise more essential.

But there is stronger evidence than this circumstance affords, of the intent of the parties in this instance. The plaintiff expressly claimed New York interest, because the lands were situated here. The defendant resisted the claim, and contended for the interest of Massachusetts. Finally,

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they agreed to a medium between both, which could only have been done with a view to the law of this state. So far, then, as the sense of the parties is material on this subject, it is expressly ascertained that they made the law of this state the basis of the contract.

But I think there are circumstances inherent in this case, which show that the law of this state, and no other, was contemplated, and ought to govern. All the parts of this transaction must be deemed to compose one contract. It is entire and indivisible, and the whole must be subject to the law of Massachusetts or of this state. It cannot be divided [‘361] and controlled by different laws. It is also executory in its operation. The defendant, it is true, bound himself absolutely to pay the money, but the plaintiff was unwilling to rely on his personal responsibility. He therefore retained the title of the land, as a security for its performance. The title, in its nature, is local, and exists here, and the security must, of course, be equally so. The security, therefore, exists in this state; and is equivalent, at least, to a mortgage of the premises executed here. Had the title been conveyed, and a mortgage executed, the debt, according to the principle maintained by Lord Hardwicke, would have been referable to the place where the security was made. So, in the present case, although the security does not appear in the form of a mortgage, it is equally effectual, and exists here as the original title did; and it seems the debt must equally refer to the place where it exists. If this analogy be just, the plaintiff would be entitled, by means of this security, to the benefit of the law of this state, in relation to the interest.

In another view, the question will be attended, and I think more satisfactorily, with the same result. The contract, as has been stated, is executory. It is precisely the same as if the defendant had covenanted to pay the money, and the plaintiff, on receiving it, to convey the premises. Its performance, on the part of the plaintiff, has evidently an immediate reference to the law of this state; for it is an established maxim, that the mode of conveyance must be regulated by

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the law of the country where the estate is situated. From the nature of the thing, the parties must, therefore, have had in view a conveyance according to our law. The conveyance must also be considered as intended to be executed here. I do not mean to be understood that it might not be executed abroad ; but the legal presumption is, that it should be done here, and that possession *be delivered with [*362] it. The performance of the contract, on the part of the plaintiff, is, therefore, clearly to be made here, or, at least, according to our law ; and if the contract be entire, as with regard to this question it must certainly be considered, it follows, that the law of this state must govern it wholly. It appears to me to be irreconcilable to suppose the contract capable of being parcelled, for the purpose of governing different parts of it by the laws of different states. The notes being payable before the time limited for the ultimate performance of the contract, may, in one sense, be denominated independent contracts ; but they are so for the purpose of the remedy only. In this sense, mutual agreements are frequently deemed independent of each other, although contained in the same instrument and relative to the same subject ; but they are not separate contracts ; they still compose one whole, and are more properly termed independent parts of the same contract.

On the question of usury, the investigation of which necessarily embraces the whole transaction, I think they can never be separated. Had the agreement been completely executed, and the notes been given for the consideration money simply, they might, as subsequent and unconnected securities, be considered as forming a separate debt, and as coming within the case of *Dewar v. Span*, already cited. In that case, there was a sale of an estate in the West Indies, and a bond given in England for the purchase money, reserving six per cent. interest. This bond was afterwards cancelled, and another given, carrying the same interest. The transfer of the property was complete ; and in a suit brought on the second bond, Lord Kenyon observed, that the simple question was, whether a bond given by one per-

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son to another, both resident in England, was valid, though it reserved more than English interest. The question in the present case is very different, inasmuch as it depends [*363] on the *original contract of sale, which is still open, and to be executed within this state.

I think this case is equally to be distinguished from that of *Stapleton v. Conway*, (1 Ves. 427,) in which Lord Hardwicke is reported to have held, that a mortgage made in England on an estate in the West Indies should carry no more than English interest. His Lordship's opinion is plainly founded on the idea of a simple loan or debt, created in England, between parties residing there, and unconnected with any circumstances arising from the nature or the objects of the contract, to entitle it to India interest. Although this opinion seems to have been questioned, and probably produced the statute, which, after reciting doubts, prescribes a different rule. I should be inclined to respect the high authority of Lord Hardwicke, if it were applicable to the case before us. But the circumstances here are essentially different. The premises, which are the consideration of the contract, are situated within this state; the parties themselves had an express view to our law; one of them resided here; the title was retained as a security for the performance on the part of the defendant; the agreement was executory, and on the part of the plaintiff was clearly to be executed according to the law of this state, and being entire, it must be wholly governed by it.

For these reasons, I am of opinion, that the law of this state, and no other, must decide, and of course, that no usury exists.

It may also be a question how far the statute of Massachusetts, in relation to this subject, is to be regarded as a penal act; and whether our courts will enforce the penal laws of another state; but believing the grounds already stated to be sufficient for the present decision, I forbear to examine the latter points.(a)

(a) See 1 H. Black. 143; 1 Johns. Rep. 95; Cowp. 343.

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*KENT, J. 1. The act of Massachusetts is substantially the same as the statute of Anne and the act of this state, on the subject of *usury*; and is accordingly to receive the same construction. I have compared them, and the act of Massachusetts is equally extensive in its operation. It reaches expressly to all usurious contracts, "for the loan or forbearance of moneys, or other things actually lent or sold." [*364]

Usury is taking more than the law allows, for forbearance of a debt; and whenever a debt is created, and there is an agreement to pay more than legal interest for forbearance of payment of it, such agreement is usurious. (1 Ves. jun. 531. Cowp. 115.) If a loan be necessary to constitute a usurious contract, yet it is not necessary to the creation of a loan, that the money should be paid on the one hand, and received on the other; for the circumstance of a man's money remaining in another's hands, in consequence of an agreement for that purpose, will constitute a loan. (Cowp. 113.) In the cases of *Floyer v. Edwards*, (Cowp. 112,) and of *Spurrier v. Mayoss*, (1 Ves. jun. 527,) no doubt seems to have been entertained in the court of K. B. or by the commissioners in chancery, but that upon the sale of lands or goods, an agreement reserving excessive interest for forbearance of payment of a debt might be usurious. To make an agreement usurious, it was held necessary only that there should be a debt created on such sale, and a corrupt agreement, to take illegal interest thereon, for forbearance of payment.

In the present case, there was a debt created absolutely, in the first instance, and an action would lie on the bond, after the time limited for payment. It is also stated to have been proved, that the notes, at the rate of six and a half per cent. were taken by the express understanding of the parties, as interest for forbearance of payment of the principal. It is ascertained and stated, that this was the view of the parties at the time. This *precludes all doubt as to [*365] the true intent and meaning of the parties, and all pretence for saying the interest was here part of the price of the estate, and not a satisfaction for delay of payment.

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2. The second point is, whether the lawful interest of this state is not to be the rule by which the contract is to be governed, notwithstanding it was executed in Massachusetts.

It is the general rule, that interest must be paid according to the law of the country where the debt was contracted, and not according to that where the debt is sued for, (1 Eq. Cas. Abr. 288, 289; 1 P. Wms. 396,) and I see nothing to take the present case out of the rule. It is true, the consideration of the debt was lands within this state; but it has repeatedly been decided, that such a circumstance makes no alteration in the law. In the case of *Stapleton v. Conway*, (1 Ves. 428; 3 Atk. 727,) Lord Hardwicke observed, that if a contract was made in England for a mortgage of a plantation in the West Indies, and there be a covenant in the mortgage for the payment of eight per cent. interest, it would be within the statute of usury, notwithstanding that was the rate of interest where the lands lay. For if the courts were to suffer a mortgage made in England, on lands abroad, to carry at foreign interest, it would be a method to evade the statute of usury. Such a contract would be as much against the statute as any other contract.

The case of *Dewar v. Span*, (3 Term Rep. 425,) is to the same effect. A bond was given in England upon the purchase of an estate in the West Indies, with the reservation of interest at six per cent. and although it was contended on the argument, that though the bond was executed in England it arose out of a contract for the purchase of a West India estate; yet the court unanimously held the bond to be usurious; and that if that attempt were to succeed, it would sap the foundation of the statute of usury. And to [*366] prevent certain *inconveniences from the operation of this rule, it was provided by the statute of 14 Geo. III. that all mortgages and securities executed in England, concerning lands in Ireland or the West Indies, and bearing an interest not exceeding six per cent. should be valid; but this statute did not extend to personal contracts.

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It was admitted, in the case of *Robinson v. Bland*, (2 Burr. 1078,) that the law of the place where the contract was made was not to be the rule by which it was to be governed, if the same was entered into with an express view to the law of another country; as in that case the bill of exchange for a gaming debt, although drawn in Paris, was, by the express terms of it, made payable in England.^(b) But in the present case, there is no such language; and the law will intend the contract was to be executed where it was made, and to have a reference to the law of that state.

Though it be admitted that the parties had in view the law of this state in the establishment of the rate of interest, that makes no alteration, as I apprehend, in the result. In the case of *Dewar v. Span*, the parties equally had in view the West India rate of interest where the land lay. Suppose an inhabitant of this state had gone to the plaintiff at Pittsfield for the loan of money, and the plaintiff had exacted seven per cent. and declared in his bond, that as the borrower lived in this state, and the money was to be used here, the parties, deeming it reasonable, had agreed that the rate of interest on the loan should be seven per cent. according to the rate of interest here. Would such a bond with such an express reference to our law, be valid under the statute of Massachusetts? I conclude not; for notwithstanding the borrower lived here, yet the rule in *Huberus* applies, that "whoever makes a contract in any particular place, is subjected *to the laws of the place as a temporary [*367] citizen." It is not enough that the parties have a view or reference to the law of another state, in the formation of their contract; for if that were sufficient, the statute of usury would, in every case, at the option of the parties, become a dead letter. The rule is, that the parties must have a view to the laws of another state in the execution of the contract, and then undoubtedly the contract is to be governed by such foreign law. Had the money, for instance

(b) See also 1 Johns. Rep. 426. 1 Caines' Rep. 412. Huber. lib. 1, tit. 111, *de conflictu leg.* 2 Johns. Rep. 235. 3 Dallas, 370. 1 H. Black. 684. 4 Johns. Rep. 285. 1 Johns. Cas. 139.

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in this case, been made payable at Albany or elsewhere, in this state, then, perhaps, the decision in *Robinson v. Bland* would have applied, and our law would have governed ; but no place being appointed, the law will intend the place to be where the contract was made, and where the person resides, to whom the money is payable.

The parties, it is true, must have had in view the law of this state in the execution of the deed for the land ; for the requisite solemnities of conveyance of land must be conformable to the law of the country where the lands are situated. But I cannot suppose that the circumstance of the conveyance has any influence upon the reservation of interest, by the contract for the payment of the money, any more than the West India purchase had in the case of *Dewar v. Span*. The payment of the money was a distinct and prior duty. The bond is absolute. The notes for which the present suit is brought were made payable, one, two and three years, before the time for the execution of the deed. They are, therefore, to be considered as a distinct and independent contract, completely executed on the part of the defendant. The plaintiff, by retaining the title in himself until the money was paid, has preserved a *lien* upon the land to the same purpose and effect as a mortgage ; and suppose the *lien* had been retained in the shape of a common mortgage, would that have altered the case ? The circumstance of a mortgage being given to secure the payment of a bond, [*368] reserving usurious interest, has "never been deemed sufficient to take the case out of the statute, though the mortgage be on lands abroad, and intended by the parties to be governed by the foreign law. This was the case in *Stapleton v. Conway*.

Suppose then a person in this state had gone to the plaintiff in Pittsfield to borrow money, and the plaintiff had loaned money at seven per cent. and to secure the payment had taken a mortgage on lands here, executed as it must be according to our law, and, for greater security, had got the same recorded in the county where the lands lie, would a suit, in that case, on the bond, in the courts of Massachu-

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setts, be governed by our law or by their own? If by our law, then their statute becomes a nullity, whenever the usurious lender in that state is prudent enough to take the real security abroad for the debt. Then the statute in England of 14 Geo. III. was unnecessary and idle, for it says, mortgages taken in England on lands abroad, and bearing an interest above their legal rate, may be good. But if the bond in that case, would be void, then I ask, where is the substantial difference between the case stated, and the present? The plaintiff has not taken a mortgage in form, but he has done substantially the same thing; he has retained the equitable *lien* in his own hands. It is true, that when the money is paid, a deed is to be executed so as to be valid by our law; and so in the other case, of a mortgage, when the money is paid the fee is to be revested, and the mortgage cancelled, in a valid manner, according to our laws. I see no difference in the cases so material as to render the contract in the one case null and in the other good.

The notes are given, by the express terms of them, for lawful money of Massachusetts; and this being a personal contract, and operating distinctly and independently, and payable where the parties reside, it must be governed by the law of the place where it was made.(c) *I [*369] cannot distinguish this case, in reference to the usury, from the cases I have cited.

It being then to be considered that the notes are, by the law of Massachusetts, usurious and void, and that the law of that state, and not of this, is the rule by which the contract for the payment of the money is to be governed, it follows, that we are bound to pronounce upon it according to the law of Massachusetts. It was a principle admitted by this court in the case of *Lodge v. Phelps*, (1 Johns. Cas. 139,) that the *lex loci contractus* was to govern in the determination of personal contracts; and this is a rule of justice in practice among all civilized nations. (1 Bos. &

(c) See 2 Esp. Cas. 523. 7 Term Rep. 241. . 1 Johns. Rep. 94.

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Pull. 141, 142. 2 Ersk. Inst. 473, 474. Huberus, loc. cit.)

I am, accordingly, of opinion, that judgment ought to be rendered for the defendant.

LEWIS, J. How far the *lex loci contractus* is, in this case, to govern, or whether usury is applicable to any contracts but those which respect loans, I shall not consider, because, in my view of the subject, it cannot be affected by them. For admitting that the decision must be according to the law of Massachusetts, and that the statutes of usury extend to cases of forbearance, where there has been no loan, in my opinion, this would in no country be considered a case within them. The amount of the bond and notes together constitute the price, upon payment of which the lands were to be conveyed; and, upon whatever principle the plaintiff may have calculated the difference between his cash and his credit price, whether on that of a certain rate of interest, or of an equivalent for the probable increased value of the land at the period of payment and execution of the conveyance, is perfectly immaterial. He may, certainly, without exposing himself to the penalties of usury, ask one price, in cash, for his lands, and any greater sum on credit; and although he should assign as a reason that lands [*370] sold on credit *ought to yield more than legal interest, the nature of the contract would not be more affected thereby than if he should say, my lands, if kept to such a day will yield me so much, therefore, I will ask it. The notes speak not of interest, and the plain and simple language of the contract is, on your paying me 333 dollars and 33 cents, in four equal annual payments, and the further sum of 1228 dollars and 50 cents, at the end of four years, I will convey to you, &c.

I am of opinion, the plaintiff ought to have judgment.

LANSING, Ch. J. concurred with LEWIS, J. on the first point, that the notes were part of the *price* for the land, and not usurious; and that the plaintiff was, therefore, entitled to judgment; on the second point, he concurred with KENT, J. that the *lex loci contractus* ought to govern. He gave

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his reasons at large, but the Reporter is unable to state them.

Three of the judges, (contra, KENT, J.) were, therefore, in favor of a judgment for the plaintiff.

Judgment for the plaintiff.(d)(e)

 *MAYELL *against* POTTER.

[*371]

Where a master of a vessel signed a bill of lading to deliver four cases of goods to N. T. at Norfolk, who was a transient person, and not a resident at Norfolk, and the master, on arriving at Norfolk, inquired for N. T. and could not find him, and delivered the goods to merchants there for N. T. it was held, that the master, having acted *bona fide* and according to the usage of trade, was not, under the particular circumstances of the case, liable to the consignor on the bill of lading.

THIS was a special action on the case, on a bill of lading signed by the defendant, as master of the schooner Dove, at

(d) [Old note.] But on the points of law, the judges may be considered as equally divided.

1. LANESING, Ch. J. and LEWIS, J. were of opinion, that the notes were not usurious by the law of Massachusetts. RADCLIFF, J. and KENT, J. contra.

2. LANESING, Ch. J. and KENT, J. were of opinion, that the *lex loci contractus*, or law of Massachusetts ought to govern. RADCLIFF, J. contra; and LEWIS, J. gave no opinion as to the point. So, on both grounds two of the judges were in favor of the defendant.

(e) The question presented in this case has not been decided to the knowledge of the editor. If the bond had been made payable in the state of New York, there would have been no difficulty in determining the case. The transaction would have been valid upon the ground that the contract was to be executed in New York, and also upon the ground that there may be two places of contract—that where it is made, and that where it is to be paid or performed, and that the rate of interest may be stipulated according to either, according to the rule in *Depau v. Humphreys*, (20 Martin, 1,) approved in *Chapman v. Robertson*, (6 Paige's Rep. 634,) by Walworth, Ch. Consult Story's Conflict of Laws, ed. 1846, §§ 287 a, 298 and 293 c, n. 1, where the opinion of Walworth, Ch. in *Chapman v. Robertson* is considered, and the dissent of Mr. Justice Story from the reasoning expressed, though the conclusion of the chancellor is admitted to be correct.

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New York, on the 31st January, 1799, in which he acknowledged the receipt of four cases of merchandize to be delivered to Najah Taylor, or his assigns, at Norfolk, in Virginia, and which the plaintiff averred had not been delivered.

The facts were, that Najah Taylor left New York a few days before the defendant sailed, and arrived at Norfolk about the 6th February, 1799, and remained there until the 26th February, but did not reside in Norfolk. He only went there on business, and considered himself a transient person, and had no attorney or agent there. During that time, he frequently inquired whether said schooner had arrived, and found she had gone to City Point, about 100 miles above, and that he frequently inquired at the post office for letters from the plaintiff or defendant, and found none. The defendant sent by a Hampton pilot from City Point to Thomas Allen, on the 11th or 12th February, the four boxes of goods to be delivered to Najah Taylor at Norfolk, or his assigns. Allen not being able to learn where Najah Taylor was, and there being no agent for Taylor in Norfolk, as he could discover, he delivered the boxes, with the letter and invoices accompanying the same, to Messrs. Macgill & Taylor, vendue masters and commission merchants in Norfolk; supposing, as the direction to deliver to Najah Taylor was badly written, the goods were intended for Macgill & Taylor. The goods, except eight hats, which have been sold for the benefit of the plaintiff, still remain in the hands of Macgill & Taylor, subject to the orders of Thomas Allen. It

[*372] was further proved to be "customary for vessels to go to City Point, and from thence to send to Norfolk such part of their cargo as was intended to be left there; and that it was the custom of merchants, when the consignee of goods was not to be found, on the arrival of the goods at the port of delivery, and did not call to receive the goods, for the master to store them.

Upon these facts the judge at the trial charged the jury, that if the defendant had acted with good faith, and accord-

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ing to usage, he was acquitted; and a verdict was accordingly found for the defendant.

A motion was now made to set aside the verdict, for the misdirection of the judge.

Woods, for the plaintiff.

Wilkins, contra.

LEWIS, J. delivered the opinion of the court. That common carriers are, by the general law on that subject, bound to deliver goods according to their engagements, is not to be disputed. The questions which arise here are, whether the defendant has not complied with the spirit of his engagement; whether he is liable for accidental mistakes; and whether he is answerable for the mistake of Allen. Here the plaintiff thought proper to make a consignee of a transient person, having neither residence nor agent at Norfolk, and sailing in a different vessel from the one which carried his goods. The defendant disposed of the goods according to the usage of that particular trade, and the custom of merchants, by sending them from City Point to Norfolk, to a person there established, against whose respectability nothing is alleged, to be delivered to the consignee. This person, through mistake, delivered them to a different person.

*The case of *Golden v. Manning & Peyton*, (3 [*373] Wils. 439,) cited by the plaintiff's counsel, is much stronger *for* the defendant than *against* him. The decision is not on the *general* law, but on the particular circumstances of the case. The masters of the stage coach took a greater price than other carriers, and were in the constant practice of keeping a porter to carry goods which arrived in the coach, to the place of their destination; the goods were also to be delivered at the house of Ireland, in Princess street. The court thought these circumstances sufficient to authorize them to consider this a special undertaking to deliver the goods at the house of Ireland, by their porter. But for the circumstance of their keeping a porter to carry out goods that arrived in the coach, it would have sufficed to have lodged them in the stage-house, sending timely notice to Ire-

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land ; and had he been a transient person, having no known place of residence, this ceremony could certainly not have been required of them.(a)

The case of *Seyds v. Hay*, (4 T. R. 260,) also cited by the plaintiff, is still stronger for the defendant. Here also the decision was not on the general law, but on the special direction of the plaintiff not to deliver the goods to the wharfinger, and the special engagement of the defendant not to do so. The court therefore say, it was a deliberate act, and not a misdelivery, merely owing to mistake. From whence may be inferred, that had it been so, the defendant would have been discharged. Justice Buller also observes, that had the goods been delivered to the wharfinger, for the wharfage duty, according to usage, it would have been an answer to the plaintiff's action ; but no such usage was proved.

We are of opinion, under the circumstances of the case at bar, that the defendant is not answerable for the mistakes of Allen, should mistake in any case render [*374] *him liable for a misdelivery. Najah Taylor being

(a) The case of *Golden v. Manning & Peyton* is also reported in 2 Wm. Blacks. 916, where the opinions are stated in these terms :—" By Gould, Justice, (*absente*, De Grey, Chief Justice.) There is no occasion to enter, as has been done at the bar, into the general question of the duty of common carriers ; though it is held in *Owen*, 57, that all carriers are bound to deliver as well as carry the goods. But this case depends on its own special circumstances. The defendants certainly must be understood to have contracted to carry these goods on the same terms and in the same manner that they carried other people's. And it appears that their general course of trade was to deliver goods at the houses to which they were directed ; that they received a premium, and kept a servant for that special purpose. This box came directed to their warehouse at Birmingham. That the direction was afterwards defaced was owing to their own neglect. They had Ireland's name in their way-bill, and might have found him out by their directory. Therefore here is a gross and palpable negligence on the part of the defendants ; who, whether bound to deliver or not by the general duty of carriers, had undertaken so to do by their general course of trade ; and indeed I think that all carriers are bound to give notice of the arrival of goods, to the persons to whom they are consigned, whether bound to deliver or not.

" Blackstone and Nares, Justices, of the same opinion on the circumstances of this case, but avoided entering into the general question."

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a transient person, and it being unknown where to look for him, facts, we are to presume, known to the plaintiff, the defendant was obliged to deliver them to a third person, and he was only bound to see that such person was a responsible character; and, on such delivery, the bailee must be considered the agent for the plaintiff. It would undoubtedly be otherwise had Taylor been a resident at Norfolk, or had had an agent there.

We are of opinion, that the plaintiff take nothing by his motion.

Rule refused.(b)(c)

(b) [Old note.] See Abbott on Shipp. 3d ed. 247, c. 3, s. 12. 2 Esp. N. P. Cas. 613. *Northey and others v. Field*.

(c) It has never been expressly decided that it is the duty of a carrier, independently of any special contract between the parties or any local usage of the trade, to deliver goods at the houses of the persons to whom they are directed. The question was considered in *Hyde v. The Trent and Mersey Nav. Co.* (5 Term Rep. 389,) though the case was decided upon another ground, and the judges differed in opinion. Lord Kenyon reasoned as follows:—"If the defendants here be liable, consider how far the liability of carriers will be extended; it will affect the owners of ships bringing goods from foreign countries to merchants in London; are they bound to carry the goods to the warehouses of the merchants here, or will they not have discharged their duty on landing them at the wharf to which they generally come? It would be strange indeed if the owners of a West Indiaman were held liable for any accident that happened to goods brought by them to England after having landed them at their usual wharf. The instance of game, which has been mentioned at the bar,* shows the general sense and understanding of the public on this subject. The different claims of the respective persons concerned are separately mark-

* Messrs. Bearcroft and Lane, arg. contended, that "it never was understood that a carrier who undertook to convey goods to London was charged with the delivery of every particular parcel to the respective owners at their houses. It is in common experience to make a separate charge for the portage from the inn where the carrier puts up; and persons who have advice of the arrival of goods frequently send their own servants to the inn for that purpose. The owner of the goods, therefore, enters into two distinct contracts, the one with the carrier, the other with the inn-keeper or porter. And on this ground must have proceeded an action, which was tried not long ago at the Sittings, brought by Mr. Price against the keeper of the Bell Inn. It was an action of trover for a turkey; and it being proved that the porter who brought it to Mr. Price's house demanded more than he was entitled to for portage, and refused to deliver the turkey without such a payment, the plaintiff recovered a verdict; but if the plaintiff's argument be right in this case, that action should have been brought against the carrier and not against the inn-keeper."

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ed on the direction. The carrier, who receives a certain sum for carrying the game, is not bound, in consideration of that sum, to deliver the goods; he has performed his duty when he has brought the game to the inn where he puts up; then the business of the porter begins. I am not aware that it has ever been decided that it is the duty of the carrier to deliver such goods at the house of every individual person to whom they are directed; if it has, the action brought by Mr. Price against the keeper of the Bell Inn was misconceived; it should have been brought against the carrier, and not the inn-keeper; and yet it did not occur to the defendant's counsel in that case to make such an objection. When goods are sent by a coach, a letter of advice should also be sent to the person to whom they are directed, that he may send for them; or the price which the porter expects to receive for delivering them will induce such porter to carry them; but the carriage and portorage constitute distinct charges."

Justices Ashhurst, Buller and Grose inclined to a different opinion; and Justice Ashhurst thus states his view of the question:—"The inclination of my opinion on the general question is, that a carrier is bound to deliver the goods to the person to whom they are directed. A contrary decision would be highly inconvenient, and would open a door to fraud; for if the liability of the carrier were to cease when he had brought the goods to any inn where he might choose to put his coach, and a parcel containing plate or jewels brought by him were lost before it was delivered to the owner, the latter would only have a remedy against a common porter. It has been said, however, that it is the practice of many persons to send to the inn for their goods; but that does not prove that the carrier is not bound to deliver them, if they do not send. If the owner choose to send for his goods, that merely discharges the carrier from his liability in that case; it only dispenses with the general obligation thrown by the law upon the carrier; but it does not apply to other cases where that obligation is not dispensed with. But on this question I do not mean to give any decided opinion."

Without examining the *dicta* in detail, it may be generally stated that the strong inclination of the English courts has been to maintain the opinion of the three judges against that of Lord Kenyon. (See, per Wood, Baron, in *Rodenham v. Bennett*, 4 Price Ex. 34, cited by Dallas, Ch. J. in *Duff v. Budd*, 3 Brod. & Bing. 182; per Bailey, J. in *Garnett v. Willan*, 5 Barn. & Ald. 58; per Hallock, B. in *Storr v. Crowley*, 1 M'Clel. & Y. 129, 138. See also *Duff v. Budd*, 3 Brod. & Bing. 177; 6 Moore, 469. *Birkett v. Willan*, 2 Barnwell & Ald. 356. *Stephenson v. Hart*, 1 Moore & Payne, 357; 4 Ringham, 476. *Smith v. Horne*, 8 Taunt. 144. *Wardell v. Mourillyan*, 2 Esp. N. P. C. 693.)

The same inclination exists in the American courts. In *Gibson v. Culver*, (17 Wend. 305, 306,) Mr. Justice Cowen remarks, that "it is indeed extremely well settled, that *prima facie* the carrier is under an obligation to deliver the goods to the consignee personally;" and the remark is cited with approbation by Jewett, J. in *Fisk v. Newton*, (1 Denio, 47.) (See also *Bingham v. Rogers*, 6 Watts & Serg. 495. *Bonney v. The Huntress*, cit. 2 Kent Comm. ed. 1844, p. 604.) Chancellor Kent has also given the weight of his authority

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to this view of the question, (2 Kent Comm. ed. 1844, p. 604,) upon the authority of *Smith v. Horn*, *Bodenham v. Bennett*, *Garnett v. Willan*, *Duff v. Budd*, *Bonney v. The Huntress*, and *Gibson v. Culver*. Mr. Justice Story, however, treats the question as one not yet decided. (Story on Bailments, ed. 1840, § 543. See also Abbott on Shipping, Am. ed. 1846, pp. 462, 463.)

On the other hand, *Chickering v. Fowler*, (4 Pickering, 371,) must be regarded as according with the opinion of Lord Kenyon, in *Hyde v. The Trent and Mersey Navigation Co.* *Fox v. Blossom*, *Packard v. Bordier*, (cited 2 Kent Comm. ed. 1844, p. 605, n. (d,)) and *Cope v. Cordova*, (1 Rawle, 203,) are to be regarded as going upon the ground of understanding or usage, and therefore inapplicable to the abstract question. (See also *Pickett v. Downer*, 4 Vermont, 21.)

It must be very rarely, if at all, that the question presented can arise, for in almost every case either the carriage is under a special contract or in accordance with a usage of the trade; either of which will of course govern upon well settled principles of law and justice.

Let us now briefly examine some of those cases which are referable to usage.

It is the duty of carriers to take charge of the baggage of passengers, and see it safely delivered to them at the end of the journey; (*Cole v. Goodwin & Story*, 19 Wendell, 251; *Powell v. Myers*, 26 Wendell, 591;) or if the owner is not present to receive his baggage, or does not send for it, according to the usage, to store it.

The usage of express agents is understood to be to deliver parcels at the place to which they are directed, if it be upon the line, or at either of the termini of their route, and this, as we have seen, would govern. On the contrary, the usage is understood to be where goods are brought from beyond sea, or heavy goods from places in this country, to deliver them at the warehouse of the carrier. In such a case as this, and indeed in every case where the carrier is not obliged to make delivery to the consignee, he must give notice that the goods have arrived. (Story on Bailments, ed. 1846, §§ 543, 544. *Fox v. Blossom*; *Cope v. Cordova*; *Pickett v. Downer*; *Packard v. Bordier*; *Gibson v. Culver*; *Fisk v. Newton*; *ut sup.* *Gatliffe v. Bourn*, 4 Bingham, 314. 3 Manning & Granger, 642. See *Granger v. Dacre*, 12 Mees. & Wels. 431. Upon this subject, Mr. Justice Story observes, (Story on Bailments, ed. 1846, § 545,) "In America, the rule adopted in regard to foreign voyages, although it has been matter of some controversy, seems to be, that in such cases, the carrier is not bound to make a personal delivery of the goods to the consignee; but it will be sufficient, that he lands them at the usual wharf or proper place of landing, and gives due and reasonable notice thereof to the consignee. (2 Kent Comm. lect. 40, pp. 604, 605, and note (c), 4th ed.) The latter is, under such circumstances, after such notice, bound to provide suitable persons to take care of the same, and to carry them away. (*Chickering v. Fowler*, 4 Pick. 371. *Cope v. Cordova*, 1 Rawle, 203. *Kohn v. Packard*, 3 Miller Louis. Rep. 225.) The general usage seems also to be in conformity to this rule. But it is of the very essence of the rule, that due and reasonable notice should be given to the consignee, before or at the time of the landing,

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and that he should have a fair opportunity of providing suitable means to take care of the goods, and to carry them away. (*Ostrander v. Brown*, 15 Johns. R. 39. *Kohn v. Packard*, 3 Miller Louis. R. 225. *Pickett v. Downer*, 4 Vermont Rep. 21. *Gatliffe v. Bourn*, 4 Bing. New Cas. 314, 330, 331, 332.) And, the carrier does not, by sending the goods to the consignee by a carman, without the orders of the consignee, discharge himself from responsibility, even though it is a common practice. (*Ostrander v. Brown*, 15 Johns. R. 39. 2 Kent Comm. lect. 40, p. 604, 605, and note, 4th ed.) If the consignee is unable, or refuses to receive the goods, the carrier is not at liberty to leave them on the wharf; but it is his duty to take care of them for the owner. (2 Kent Comm. lect. 40, p. 604, 605, and note, 4th ed. *Mayell v. Potter*, 2 Johns. Cas. 371. *Stephenson v. Hart*, 4 Bing 476. *Chickering v. Fowler*, 4 Pick. 371. *Cope v. Cordova*, 1 Rawle, 203.)

It is competent, however, to a carrier to prove that the uniform usage and course of the business in which he is engaged, is to leave goods at his usual stopping places in the towns to which the goods are directed, without notice to the consignees; and if such usage be shown of so long continuance, uniformity and notoriety, as to justify a jury to find that it was known to the plaintiff, the carrier will be discharged. (*Gibson v. Culver & Brown*, 17 Wend. 305.)

The case has arisen where the owner of the property was not known, and could not, after reasonable efforts, be found, and it was there held that the carrier may discharge himself from further responsibility, by placing the goods in store with some responsible third person in that business, at that place, for and on account of the owner. In such a case, the storehouse keeper becomes the agent or bailee of the owner of the property. And it was accordingly held, where the consignee of certain kegs of butter sent from Albany to New York by a freight barge was a clerk, having no place of business of his own, and whose name was not in the city directory, and who was not known to the carrier, and after reasonable inquiries by the carrier's agent could not be found, that the carrier discharged himself from further responsibility, by depositing the property with a storehouse keeper then in good credit for the owner, and taking his receipt for the same, according to the usual course of business in that trade, though the butter was subsequently sold by the storehouse keeper, and the proceeds lost to the owner by his failure. (*Fisk v. Newton*, 1 Denio, 45.) See further, upon the subject of this note, per Abbott, Ch. J. in *Birkett v. Willan*, 2 Barn. & Ald. 358, commented on by Bailey, J. in *Garnett v. Willan*, 5 Barn. & Ald. 58. Jones on Bailment, Am. ed. 1828, 105, i.)

BERNARD *against* WILCOX.

A surviving partner may maintain a suit in his own name, for a debt incurred to the partnership after the death of his co-partner, and also where the debt was contracted in the lifetime of the partner.

THIS was an action of *assumpsit* for goods sold and delivered. The evidence was, that the account rendered to the defendant, and a letter demanding payment, were in the name of William Bernard & Son. That the plaintiff and his father, whose name was also William, had been formerly co-partners in trade, under the said firm; but that the father had withdrawn from the partnership for some years, and previous to the sale of the goods for which this action is brought; and the plaintiff had continued to do business under the same firm. The amount of the ac- [375] count, and the sum due thereon, were not disputed; but the defendant contended, that the plaintiff could not maintain this action in his own name, without stating that he carried on trade under the firm aforesaid; and on this ground, an application was made to set aside the verdict, and for a new trial.

Woods, for the plaintiff.

Munro, contra.

LEWIS, Ch. J. delivered the opinion of the court. The decisions in the case of *Smith v. Barrow*, (2 Term Rep. 476,) and *Hyat v. Hare*, (Comb. 382,) come fully up to this case. In the first, it is determined that a surviving partner may maintain a suit in his own name, for a debt incurred to the partnership, after the death of his co-partner; and in the second, that he may maintain such suit after the death of his partner, though the debt was contracted during the life-time of such partner.(a)

Motion denied.

(a) See 1 Chitt. Pl. Am. ed. 1828, p. 11, and references. Broom on Farties, 65, 97. *Penn v. Butler*, 4 Dall. 354. *Nixon v. M'Carthy*, 2 Dallas, 65,

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[*376] *THE PEOPLE *against* PLEAS AND CLARK.

A. died intestate, leaving a widow and seven children, who were all minors, in 1784, except one. A suit having been commenced in 1783, against the widow, as tenant in possession, under a lease for lives, the administrator, in 1784, after advising with counsel, and with the consent of the widow, and one of the heirs, who was of age, surrendered the lease, supposing it to be forfeited, for 750 dollars, though, in fact, it was worth a much larger sum. As no release or conveyance was executed by the administrator, the heirs afterwards brought an action of *ejectment* in the name of the administrator, to recover the possession of the leasehold estate; and the administrator, in 1799, executed a release of the estate, and also of the action, in consideration of the 750 dollars, before received, though he then believed that the property belonged to the heirs, and was not forfeited.

In an action brought on the administration bond, alleging a *devastavit*, it was held, that the administrator was justifiable in surrendering the lease, in 1784, in the manner he did, under the circumstances; but that, in 1799, when he was satisfied that he had acted under a mistake, he ought not to have executed a release of the estate, and of the action brought for the benefit of the heirs, but have left the lessor to resort to chancery to enforce the contract; and, on this ground, he was chargeable with a *devastavit*, for the difference between the sum received on the surrender, and the real value of the estate.

THIS was an action of debt, on an administration bond executed in the usual form. The defendant, Pleas, and Silvanus Pine, deceased, were administrators of Amos Pine, deceased.

The defendants, after craving *oyer* of the bond and condition, pleaded performance generally. The plaintiff replied, stating breaches and charging the defendant, Pleas, with a *devastavit*. The bond was put in suit in behalf of the children of the intestate, who were entitled to distributive shares.

The trial was on the issue *devastavit vel non*. It was proved on the part of the plaintiff, that the intestate died pos-

66, note; 1 Dallas, 250; 5 Serg. & Rawle, 86. *Murray v. Mumford*, 6 Cowen, 441. *Hill v. McNeil*, 6 Porter, 29. *Allen v. Blanchard*, 9 Cowen, 681. Collyer on Partn. Perk. ed. 666, 7, 674, and authorities. See, however, per Spencer, J. in *Holmes and Drake v. De Camp*, 1 Johns. Rep. 84.

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sessed of goods and chattels, and among other *assets* that came to the hands of the defendant, Pleas, was a lease for three lives, made by Henry Beckman to the intestate, for certain lands in Dutchess county; and that two of the lives remained at the death of the intestate.

The lease was worth in 1784 from 1250 to 1750 dollars. The intestate left a widow and seven children, who were all minors in 1784 except one. About the year 1783, a suit was commenced against the widow, as tenant in possession, to recover the leasehold estate; and her counsel considering the suit indefensible, and the administrator, after advising with the widow, such of her children as were of age, to wit, John, who was *of age, and Lilly, who was [*377] not, and also with their counsel, in or about the year 1784, agreed to surrender the lease to Thomas Tillotson, who claimed the fee for 750 dollars; which was done, and the money paid and appropriated for the use of the heirs of the intestate. The widow consented to the transaction, under an impression that the lease was forfeited.

As no release or conveyance of the premises had been executed by the administrator, the heirs, previous to the year 1799, brought an *ejectment* in the name of the administrator for the recovery of the leasehold estate; and when the cause was ready for trial, in June, 1799, the administrator executed a release both of the action and the estate to the grantee of Thomas Tillotson, in consideration of the 750 dollars, before received. A short time before the execution of the release, the administrator declared, that he believed the property belonged to the children of the intestate. The widow and the two eldest children in 1789 executed a bond of indemnity to the administrator, for what he had done in respect to the premises.

Upon these facts, the judge charged the jury, that as the surrender of the lease in 1784 upon a composition with the claimant, for 750 dollars, was made by the administrator after consulting counsel, and pursuant to his advice, and with the consent of the widow and such of the family as

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were of age, it ought to exempt him from the charge of a *devastavit*; and that the release in 1799 being done in performance of the former agreement, was rightfully done.

The jury found a verdict for the plaintiffs for nominal damages; and the case was reserved for the opinion of the court.

A motion was made for a new trial, for the misdirection of the judge.

[*378] **Riggs*, for the plaintiffs.

E. Livingston, contra.

KENT, J. delivered the opinion of the court. It seems to be a just inference from the facts, that the act of the administrator in 1784, in entering into a composition with the claimant for the leasehold estate for 750 dollars, was an act done in good faith, and one that appeared to him, at the time, to be for the interest of the heirs of the intestate. The counsel who was consulted, advised it, on the ground that the recovery of the claimant could not be resisted; and the widow, who was entitled to one-third of the value of the lease, and the son, who was of age, and entitled to one-seventh of the same, acquiesced therein; and their approbation of the conduct of the administrator as being at the time judicious and honest, is to be also inferred from the bond of indemnity which they executed to him five years afterwards.

Under these circumstances, it appeared to me at the trial, and does still, that the administrator ought not to suffer for the surrender of the lease in 1784; and that the decision of the court of chancery in the case of *Blue v. Marshall and wife*, (3 P. Wms. 381,) goes to the point of his protection. That was a bill filed by a legatee against an administrator, with the will annexed, to account for 200*l.* and it appeared that the testator was possessed of a term for sixty years, which he had leased for thirty years, at the rent of 100*l.* per annum, and that at the time of the testator's death, there was 125*l.* of rent in arrear, which soon amounted to 225*l.* and the tenant becoming insolvent, the administrator, without consulting the legatee, released to the tenant the arrears of rent, amounting to 225*l.* and also advanced him 20*l.* out of

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his own pocket, upon condition that he should quit the possession, which was accordingly done. On *these facts it was insisted for the complainant, that [*379] as the administrator had voluntarily released the debt of 225*l.* and that too without consulting the plaintiff, the legatee, he ought to answer for it. But Lord Chancellor Talbot decreed, that the administrator had done nothing but what was prudent ; and that, as the tenant was unable to pay, and might, if he choose, be vexatious, and have put his landlord to great trouble and delay, the release seemed to be for the benefit of the testator's estate ; and he accordingly excused the administrator from the payment of the debt released, and even allowed him the 20*l.* he had advanced out of his own pocket, as being one entire consideration for the tenant's quitting the possession.

It appears to me that the circumstances constituting the defendant's excuse in the present case, are full as strong as in the case I have cited. But the next question is, that no release was, in fact, executed by the defendant, and as he became satisfied, afterwards, as appears by his own declaration, that the leasehold estate was not forfeited, but belonged to the heirs of the intestate, was he justifiable in acting again, to complete the contract ?

In my present view of the subject, he was not. There were circumstances in the year 1799, sufficient to satisfy the defendant, and which did satisfy him that the original agreement was founded on mistake. The consent to surrender the lease in 1784 was made under the impression that the lease was forfeited, and that a defence would be unavailing. When it was afterwards discovered that the lease was not forfeited, or the defendant had reason to conclude so, he ought to have desisted from any farther interference, and have left the claimant to resort to chancery for the execution of the contract. There the truth could be investigated. Nor ought he to have arrested the suit at law, instituted for the benefit of the minor children, and to determine to *whom the estate legally belonged. Acting as [*380]

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trustee for others, he was under obligation not to carry the original agreement into effect, after he had become satisfied that it had originated on his part in mistake, and upon the presumption of a fact which did not exist. So far from carrying into execution such an agreement, a court of equity will relieve against contracts founded in mistake and imposition. The case of *Cocking v. Pratt*, (1 Vesey, 400,) is very applicable to the present case. A. dying intestate, left a widow and a daughter, who entered into an agreement concerning the personal estate. Afterwards the representative of the daughter brought a bill to set aside the agreement, and obtain a just distributive share. The mother insisted on the agreement; but Sir John Strange, the Master of the Rolls, held, that the daughter did not intend at the time of the agreement to take less than her legal share, though what that was did not clearly appear to her. Whether there was a *suppressio veri* did not appear, but as the daughter had, no doubt, intended to take her full share, and it appearing afterwards that she had not taken all she was entitled to, and that the difference was very considerable, the agreement was set aside.

In the present case, the administrator appears to have discovered that the estate which he had formerly agreed to surrender, under the impression that it was forfeited, was not forfeited, but belonged to the heirs of the intestate; and that instead of receiving a composition price, the heirs was entitled to the full value of the estate. Here then was a *locus penitentiae* for the administrator; and his subsequent act, after that discovery, in releasing the action and the estate, must be adjudged wilful, and done in fraud. He became, therefore, properly chargeable with a *devastavit* to the amount of the difference between what he originally took for the estate, and what was its real value.

[*381] *On this ground I am now satisfied, the direction to the jury, and their finding, were wrong; and that

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the verdict ought to be set aside, and a new trial awarded, with costs to abide the event of the suit.

RADCLIFF, J. absent.

New trial granted.(a)

 BARNES *against* KENYON.

An action of debt in this court, on a judgment in a court of common pleas, is a local action ; and the *venue* must be laid in the county where the judgment was given.

THIS was an action on a judgment in the Washington court of common pleas, and the *venue* was laid in Albany.

Woods, for the defendant, now moved to change the *venue* to Washington county.

Woodworth, contra.

Per Curiam. This case comes within the decision of this court in the case of *Pettit v. Carman*, (July term, 1798.) It was there decided, on the authority of Hobart, (169,) that debt on judgment was a local action, and the *venue* must be laid in the county where the judgment was given.

The case in Hobart is very decisive, and assigns as the reason that the plaintiff must count upon the record, by which it will appear that the cause of action arose in that county where the judgment was given, for the judgment makes a new contract. This case is cited and sanctioned by Gilbert on Executions, p. 97, *Roll's case, [*382] in 7 Jac. I. is cited in Yelv. 218, and admitted to be good law ; and it is a decision to the like effect. There is a precedent in 1 Wils. Rep. 316, of a declaration in K. B. on a judgment of an inferior court at Southwark in the county of Surrey ; and the *venue* was laid in Surrey, and not in Middlesex, where the court of king's bench sits. The mo-

(a) See Williams on Executors, 1278, 1279, 1281-1284.

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dern practice seems, therefore, to be conformable to the ancient decision.

Motion granted.(a)

ZIELE AND BECKER *against* THE EXECUTORS OF
CAMPBELL.

Where there are several persons jointly indebted, or jointly responsible, and all of them are not made defendants, it must be pleaded in abatement, and cannot be taken advantage of at the trial.

THIS cause came before the court, on a writ of error from the Albany common pleas.

The executors of Campbell brought an action of assumpsit in the court below, for work and labor done by the testator; the plea was the general issue. On the trial the plaintiff proved that the defendant and several other persons who had located a certain tract of unappropriated land, met at a certain place, and the testator, who was a surveyor, attended also, by appointment of some of the persons interested in the location, and was employed with the knowledge and consent of them all to survey the land which he accordingly did.

The defendant, upon this testimony, objected that the suit ought to have been brought against all the per-

(a) In *Goodrich v. Colvin, et al.* (6 Cowen, 397,) the principal case was cited, but the court observed:—"Admitting the English practice to be as stated, there is no reason why we should follow it. The main object of a venue is to facilitate the obtaining and introduction of testimony at the trial. These trials in debt on judgment, when by record, are in term time, by the record itself, without regard to the place where it may be filed. And if there be any other plea or issue than *nul tiel record*, the venue may be changed, to subserve the convenience of witnesses, as in ordinary cases. There is nothing in the nature of debt on judgment which makes it local." (See also *Graham's Practice*, 3d ed. vol. 1, p. 597.) In *Kelly v. Mullany*, (2 Hall, 205,) the question was argued by counsel, but not decided. (See also *Burrackiff's Executors v. Grisecow's Administrator*, 1 Cox, 193.)

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sons *interested in the location, which objection was [*383] overruled by the court.

KENT, J. delivered the opinion of the court. This objection might have been good in a plea of abatement, but is inadmissible, if raised at the trial, upon the general issue. The case of *Rice v. Shutè*, (5 Burr. 2617,) and *Abbot v. Smith*, (2 Black. Rep. 947,) have solemnly and fully settled this point; and the principle, or ground of the decision in those cases, applies equally to this case, and to every other case where two or more defendants are responsible on a joint undertaking. "It is convenient and just that the defendant should take advantage of this objection (if at all) at the beginning of the suit, and plead it in abatement; and he ought not to be permitted to lie by and put the plaintiff to the delay and expense of a trial, and then set up a plea not founded in the merits of the cause, but on the form of proceeding."

It is a principle of very ancient date in the common law, and has been applied to specialties, as well as to simple contracts. (See the cases cited by De Grey, Ch. J. 2 Black. Rep. 950.) The same point came into view and was sanctioned by the court of common pleas in the case of *Scott v. Godwin*, (1 Bos. & Pull. 66.) "A writ," says Lord Ch. J. Eyre, "shall abate, that has not made all the parties co-defendants, because the plaintiff may have a better writ in the same cause; but the action shall not be barred because the plaintiff has, in himself, an absolute right to sue the defendant. The defendant can only insist, if he pleases, that the plaintiff shall sue others with him, and this advantage he may waive, where the objection does not appear on the face of the record, and does waive, in that case, unless he plead in abatement."

In short, the rule applies to all joint contracts, as well as to those arising particularly from mercantile partnerships, *that if all who ought to be plaintiffs are not joined, it is ground for a nonsuit; if any are omitted as defendants, it is only in abatement. [*384]

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We are of opinion, therefore, that the judgment must be affirmed.

Judgment affirmed.(a)

BRANT *ex dem.* THE HEIRS OF DAVID PROVOOST
against GELSTON.

A. being seised of lands, by indenture, "in consideration of natural love and affection, and for the better maintenance of the grantees, conveyed the premises by the words 'give, grant, alien, enfeoff and confirm,' to his daughter, H. and B. her husband, to the use of H. for life, with power to her to sell the same in fee, at any time, if she choose, to any person, by deed or will, and the money arising from such sale to keep for her own use and maintenance; and in case the said H. should not sell the premises, then, after her death, he, the said A. conveyed the same to B. the son-in-law, for life, and after his death, to the heirs of the body of H. and his, her, or their heirs and assigns for ever, equally to be divided between them, share and share alike." B. and H. took possession, and, afterwards, for the consideration of five shillings, by lease and release, conveyed the premises to C. in fee, in trust that he should reconvey the same premises to B. in fee; and C. being so seised by virtue of such lease and release, on the next day, for the consideration of ten shillings, reconveyed the premises to B. who, afterwards made his will, devising the premises to D. for 31 years, and died. H. died without issue, and A. afterwards died, leaving four sons and four daughters, his heirs at law. In an action brought by the heirs at law against

(a) *Stoney v. McNeill*, Harper, 173. *Horton v. Cook*, 2 Watts, 40. *Jordan v. Wilkins*, 3 Wash. C. C. 110. *Moore v. Russell*, 2 Bibb, 443. 2 J. J. Marsh. 38. *Wilson v. Wallace*, 8 S. & R. 55. *Geddis v. Hawk*, 10 id. 33. *Winslow v. Merrill*, 2 Fairf. 127. *Brown v. Warram*, 3 Har. & J. 572. *Powers v. Spear*, 3 N. Hamp. 35. *Robinson v. Robinson*, 1 Fairf. 240. *Robertson v. Smith*, 18 Johns. R. 459. *Williams v. Allen*, 7 Cowen, 316. *Cumming v. Eden*, 1 id. 70. *Gay v. Carey*, 9 id. 44. *Coffee v. Eastland*, Cooke, 159. — *v. Kenon*, 1 Hayw. 216. *Barry v. Foyles*, 1 Pet. 317. *Mackall v. Roberts*, 3 Monr. 130. *Barstow v. Fossett*, 11 Mass. 250. *M'Arthur v. Ludd*, 5 Ham. 517. *Morgan v. Crimm*, 1 Monr. 129. *M'Call v. Price*, 1 M'Cord, 82. *Conley v. Good*, 1 Breese, 96. *Bradley v. Camp*, Kirby, 106. *Brown v. Belchee*, 1 Wash. 9. *Barrett v. Watson*, id. 372. *Le Page v. M'Crea*, 1 Wend. 164. *Allen v. Sewall*, 2 id. 327. *M'Gregor v. Balch*, 17 Vermont, 562. *Neally v. Moulton*, 12 N. Hamp. 485. See 6 Dana, 341. 3 Monroe, 130.

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a tenant under D. it was held, that H. took an estate for life, with a vested remainder in tail; that the words, "heirs of the body," &c. were words of limitation, and not of purchase, notwithstanding the words added, "and to his, her, or their heirs and assigns," &c. which were to be rejected as repugnant to the estate created by the preceding words; and that the power to H. was intended for her benefit, and was well executed; and the estate vested in B. and those claiming under him.

THIS was an action of ejectment for lands in the city of New York. The jury found a special verdict.

The following are the material facts which it contained: David Provoost, the elder, of New York, being seised in fee of the premises in question, on the 10th day of April, 1762, by an indenture between him and Jacob Brewerton, of King's county, and Helena his wife, (who was the daughter of the said David,) in consideration of natural love and affection, and for the better maintenance of the grantees, conveyed by the words "give, grant, alien, enfeoff and confirm," to them the "premises, to the use of Hele- [*385] na, for her life, with power to her to sell the same in fee at any time if she should choose to any person by deed or will, and the consideration money arising on such sale, to keep for her use and maintenance, and by the said indenture ratified such sale or sales as good and valid. And in case Helena should not sell the premises as aforesaid, then after her death, he, the said David Provoost, by the same deed, conveyed the same to the said Jacob Brewerton, for his life, and after his death to the heirs of the body of Helena, and to his, her, or their heirs and assigns forever, equally to be divided between them, share and share alike; yielding and paying therefor to the said David Provoost, the yearly income, rents and profits thereof during his life, if the same should be demanded, and not otherwise.

By virtue of this deed, Jacob Brewerton and Helena took possession of the premises, and being so seised, afterwards by lease and release, bearing date respectively the 11th and 12th days of September, 1764, and for the consideration of five shillings, conveyed the same to Augustus Van Cortlandt, of the city of New York, in fee; and in trust, that he should

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reconvey the same premises to the said Jacob Brewerton in fee.

The said Augustus Van Corlandt beng seised thereof, accordingly did, by lease and release, bearing date respectively the 13th and 14th days of September, 1764, and for the consideration of ten shillings, reconvey the premises to the said Jacob Brewerton, in fee, who entered, was seised, &c. and being so seised of the premises, did, on the 20th day of March, 1789, make his last will, and thereby devised the premises to Robert Carter, jun. and Carey Ludlow, for the term of thirty-one years, and afterwards, on the 19th October, 1790, died. Helena died the 11th January, 1769, without issue, and David Provoost the elder died on] the 29th

October, 1783, without ever having demanded rent [*386] for the premises, and leaving William Provoost, James Provoost, John Provoost, David Provoost, Helena Bormore, Catherine Provoost, Johanna, the wife of John Brown, and Johanna, the wife of Samuel Kelly, his heirs at law.

Robert Carter, jun. and Carey Ludlow, after the death of Jacob Brewerton, to wit, on the 1st day of November, 1790, demised the premises to the defendant, to hold from year to year.

Troup and Hamilton, for the plaintiff.

Riggs and Harison, contra.

KENT, J. The following questions have been raised by the counsel :

- 1. Whether there was a power given to Helena, and properly executed by her, to vest the fee of the premises in her husband, Jacob Brewerton?

- If this question should be answered in the negative, then,
- 2. Whether an estate tail was not vested in her by the deed of 1762, so as to render her conveyance valid, under the act of 23d February, 1786?

It will be unnecessary for me to give any opinion on the first question, relative to the power, because I am of opinion that the second question must be answered in favor of the defendant. I am satisfied, upon a full consideration of the

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case, that Helena took an estate for life, with a vested remainder in tail.

The deed gives the estate "to Helena for life, with power to sell, &c. then to Jacob Brewerton for life; then to the heirs of the body of Helena, and to his, her or their heirs and assigns for ever, equally to be divided between them, share and share alike." In consequence of this intervention of an estate of freehold, between the freehold to her and the subsequent limitation to her heirs, the subsequent limitation is not immediately "executed in her; but be- [387] comes a vested remainder, to be executed in possession, on the determination of the mesne estate. (Ferne, 26, 27, 32, 33. Walk. on Desc. 167. Harg. Law Tracts, 575.)

In giving this construction to the deed, I am governed by what is commonly called the rule in Shelly's case, (1 Co. 104. Co. Lit. 22, b, 319, b, 379, b, 377, a,) which is, that where the ancestor takes an estate of freehold, with a remainder, either mediate or immediate, to his heirs, or the heirs of his body, the word heirs is a word of limitation of the estate, and not of purchase.

The only difficulty, as to this conclusion, arises from the additional words subsequent to the words, heirs of the body of Helena, viz. "and to his, her, or their heirs and assigns forever, equally to be divided between them, share and share alike."

It must be admitted, that there is greater latitude of construction applied to wills than to deeds; and the rule generally has been allowed to be of more imperative control in the one instrument than in the other; (Ferne, 256; Harg. 502;) but the cases of *Waker v. Snow*, (Palm. 359,) and *Lisle v. Gray*, (T. Raym. 315,) arose, not upon a devise, but the one upon a fine, and the other upon a covenant to stand seised to uses. Those two cases accordingly show, that even in deeds, the word heirs has not always been held, at law, a word of limitation, but as capable of being controlled by superadding explanatory words; or words of limitation, denoting a different species of heirs.

Considering, however, the age and sanction of the rule,

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and that it is a case of a legal estate, founded on a deed, the declaration of the intent to change the word heirs, into a word of purchase, ought, at least, to be unequivocal, before the rule can cease to apply. (Hob. 33, 34.)

I am satisfied of such an intention in the present case. The superadded words do not necessarily import an intent to divert the legal course of descent; nor that other [*388] *or different persons were intended, and not that succession of persons denominated heirs at law.

The language, in cases on wills, where that intent has been deemed sufficiently explicit, was generally much more imperative than this. In *Burchett v. Durdant*, (2 Vent. 311; Carth. 154;) the testator devised to A. for life, remainder to the heirs male of his body now living. This was conclusive to show that the testator could not intend the whole line of heirs, but only used the term as a *designatio personæ*. So in the case put by Anderson in Shelly's case, (Co. 95, b,) where one enfeoffed A. for life, remainder to his heirs, and their heirs female, it was evident the feoffor intended a different class of persons from the whole inheritable blood of A. and without making the word heirs a word of purchase, the limitation to the heirs female could not be admitted. Again, in the case of *Doe ex dem. Long v. Laming*, (2 Burr. 1100,) which was a devise of lands held in *gavelkind* to A. and to the heirs of her body, as well females as males, the testator expressly rescinded the inheritable succession, and designated a different species of heirs, because females could not be admitted in a course of descent, in *gavelkind*.

There is no such necessity, in this case, of deviating from the rule, because there is no such unequivocal provision, which requires it to be set aside. It may be said that the words, "and his, her, or their heirs and assigns, equally to be divided," &c. are sufficient in a deed, as well as in a will, to create a tenancy in common; and that as the law stood at the time of the execution of the deed, the heirs of the body of Helena could not take as tenants in common, unless those words be considered as meaning children, and that those children should take as purchasers, and that this must ac-

cordingly be the intent of the deed ; and also that these children should transmit an estate in fee to their descendants.

*There is certainly much plausibility and force in [*389] this construction. But in answer to it, we may observe, that the words, equally to be divided, &c. if in a deed were formerly held to be a joint tenancy ; (1 Eq. Cas. Abr. 291 ; 2 Black. Comm. 193 ;) and although they have since been held to operate otherwise, (Sayer, 67 ; 1 Wils. 34,) the employment of them by the grantor is by no means certain evidence of his intent to control the legal operation of the preceding words, and prevent the inheritable blood of Helena from taking in the character of heirs.(a) On the contrary, the better inference is, that the grantor intended, after the limitations for life, that the estate should go to every person who could claim as heir to Helena. The words of limitation superadded are not descriptive of a different species of heirs from the first words, so as to break in upon, and divert the line of descent from the ancestor. It is rather an attempt in the grantor to prescribe a different qualification to the heirs of Helena, in their character as heirs, than what the law had prescribed. And it being once ascertained that the grantor did not use the word heirs for any particular person, in that instance inaptly denominated heir, but intended by it, as a *nomen collectivum*, the line of inheritable succession ; and that Helena, and not any individual who should happen to be the heir, at the time of her death, was to be the ancestor from whom that line was to be deduced, then I agree that the rule in Shelly's case applies with irresistible control. The heirs of her body must take in the quality, as well as the character of heirs ; and all the efforts of the grantor to change their qualifications, while he admits their character, by saying they shall take by purchase, or as tenants in common, are fruitless and of no avail.

*There are cases in point in favor of this conclusion. [*390] That of *King v. Burchell*, (Amb. 379,) was

(a) See 1 Wash. Rep. 9, 10. Bro. C. C. 219, 220. 221. Fearn, 258.

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and as far as my researches have extended, are uniform, except in cases of trusts, and perhaps dispositions of gavelkind lands. The cases of *Archer*, (1 Co. 64, b,) *Lisle v. Gray*, (2 Lev. 223,) which were adduced as exceptions, are not so. In the case of *Archer*, the terms are, *next heir male*, in the singular; and much stress appears, from authorities in which this case is cited, (2 Str. 731,) to have been laid on the word *next*. This was not, however, the turning point of the cause; it was, that the feoffment of the tenant for life, barred the remainder.

In the case of *Lisle v. Gray*, *Lisle* covenanted to stand seised to the use of himself for life, remainder to the use of Edward, his son, for life, remainder to the first, second, third, fourth, &c. sons of the said Edward, in succession, and the heirs male of their bodies: then follow these words, *and so severally and respectively, to every of the heirs male of the body of the said Edward, and the heirs male of the body of such heirs male, &c.* The judgment of the king's bench was, that the *heirs male of the body*, superadded to the limitations to the several sons of Edward in succession, should not control them so as to defeat the evident intention of the covenantor; but should be governed by them, and should be intended *sons*, as in the principal clause, and thus were words of purchase, and not of limitation. The judgment, we are told, was afterwards affirmed in the exchequer. (2 Atk. 90, note. 2 Burr. 1100.)

In *Long and Laming*, (2 Burr. 1100,) many cases are cited by Lord Mansfield to show that the rule has [*393] been *and may be departed from by *courts of law*, in *cases of devise*, where an adherence to it would manifestly defeat the intent of the testator. Should this be admitted, it will not be sufficient for our purpose. How the fact is, is not necessary here to be examined; it is not warranted, however, by the authorities he refers to. On examination they will be found (without exception) cases of limitation to the *heir* in the singular, to *sons* in succession, to *children*, or in *trust*. The positions also there advanced, that the *reason* of a rule having ceased, the rule itself may

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be departed from, and that trust estates are subject to the same positive rules and general maxims in equity, as legal estates at law, though, in general correct, are not always so, and I think, cannot, without great hazard, be applied to the subject before us.

It is true, as his lordship asserts, that this rule or maxim was the offspring of the ancient feudal tenures, and that *they* have ceased. But have not the rights of primogeniture, and numberless rules governing the transmission of real property, sprung from the same source; and can courts of justice disregard these because the *reason* of them has ceased? It certainly would be a dangerous experiment.

The second position also is *here* inapplicable. Trusts were ever independent of tenures, and, therefore, not governed by the rules springing from them. They were, in their origin, mere creatures of mutual confidence, arising out of the intent of the party creating them, and to be governed and construed by that alone. Equity, however, to preserve as far as possible uniformity of decision with the courts of law, has ever respected this rule, except in cases of mere equitable trusts, when an adherence to it would defeat the manifest intent of the party creating them.

The case of *Bagshaw v. Spencer*, (1 Vesey, 142; 2 Atk. 517,) on which his lordship so much relies, is of this description: Lord Hardwicke reversed the decree at *the rolls in the point involved in our case, on the [*394] ground that it was a trust in equity and not a mere legal estate, the fee being in the first instance vested in trustees, with a power of sale, for the payment of debts; and that the intent of the donor to give an estate for life only to Benjamin was manifest, from its being without impeachment of waste, and the limitation to trustees to support contingent remainders, with remainder to his first and other sons in strict settlement. The distinction between a trust and legal estate, is, in this case, well established; and also the principle that a court of equity may be more liberal in the construction of words, to make them agree with the intent of the party, than a court of law.

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The decision in *Coulson v. Coulson*, (2 Str. 1125 ; 2 Atk. 246,) is founded on this distinction. It was a mere legal estate ; and though the devise was for life, remainder to trustees to support contingent remainders, remainder to the heirs of the body of Coulson, it was on this distinction held to fall within the rule. And although Lord Mansfield (Doug. 323) questions that decision, (which was on a certificate of all the judges,) and asserts that Lord Hardwicke wished the principle of it to be reviewed, we find him afterwards in *Hodgson v. Ambrose* declaring it his opinion it was too late to litigate it ; and Justice Buller, going still further, and avowing himself satisfied with it ; though he admits he once had doubted it. Notwithstanding the various arguments in *Long v. Laming*, calculated to subvert the rule, we find in the conclusion of it, the decision resting principally on the ground of the lands being *gavelkind* ; and Lord Mansfield deserting the real turning point of the case, and resorting to principles wholly unsubstantial. The word *heir*, says he, is always a word of purchase ; and *heirs* in *gavelkind* is tantamount to *heir*, in ordinary cases. That *heir* has been often, under certain circumstances, construed a *nomen collectivum* is apparent from the authorities cited by Har- [*395] grave, in his note on Co. Lit. *86, from 1 Vent. 230, and Bulst. 219. Were it always a word of purchase, and *heirs* in *gavelkind* only equivalent to it, it would be difficult to invent terms of inheritance that would create a fee-simple by deed of such lands. The usual circumstance which takes the case out of the rule is, that the limitation was to daughters as well as to sons.

In *Perrin v. Blake*, this subject underwent a more thorough examination than it had ever before experienced, which resulted in a final difference of opinion among the justices of the king's bench. It was distinguishable from *Coulson v. Coulson*, by the strong circumstance of the testator's declaring it his intent, that *none of his children should sell this estate for longer than their lives*. A majority of the judges held this sufficient to place it out of the rule, and

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decided accordingly. This decision was afterwards reversed in the exchequer, seven judges to five.

The numerous authorities on this subject are very ably analysed by Mr. Fearne, except, perhaps, the case of *King v. Burchell*, (Amb. 379,) which is in the precise words of our case. The superadded words, *equally to be divided between them, share and share alike*, are inserted in the case as reported by Ambler; but are not noticed by Fearne, probably from an opinion that they were not sufficient to distinguish it from *Goodright v. Pullyn* and *Wright v. Pearson*, where the terms of inheritance are general.

My opinion is, that Helena took an estate for life, with a vested remainder in tail, to take effect in possession on the demise of her husband, and that the superadded words, "*and to his, her or their heirs and assigns forever, equally to be divided between them, share and share alike,*" must be rejected as repugnant to the estate created by the precedent words of the grant. That it being stated in the case, that Cortlandt entered and was seised, under the conveyance from Brewerton and his wife; that Brewerton "in 1764 entered under the conveyance from Cort- [*396] landt, and died seised in 1790; the act of 1786 found him in the uninterrupted possession of the premises under the conveyance from Helena, and confirmed his estate in fee-simple. The tenant, holding under his title, must therefore have judgment.

The remaining points I will also examine, although the first completely disposes of the questions.

Mildmay's case, (1 Co. 175,) and the several authorities founded thereon, determine it still to be a rule of law, though the reason of it probably ceased with the statute of uses, that a consideration is necessary to raise a use in all conveyances that do not operate by transmutation of possession, and that such use is well limited to those only who are within such consideration; that an appointee, under a power, is generally held to be within the rule, because the uses limited by the power must be such as would have been good if limited by the original deed. On the authority of this rule, the objec-

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tion to the power contained in the deed of 1762 is raised ; because of its generally authorizing appointment, which may not fall within the consideration, which it is insisted is that of natural love and affection alone ; and so the deed, operating only as a covenant to stand seised. In answer, it is said, that the deed will well enure as a bargain and sale, and that the reservation of rents and profits is tantamount to a monied consideration, and the case of *Barker v. Keate*, where a pepper corn only was reserved is relied on. (1 Mod. 262. 2 Mod. 269.) If this was a conclusive authority, all questions between the parties on this point of the case would be at an end. But in that case the consideration was general, and, therefore, there could be no objection to considering the reserved rent the only consideration intended by the parties. It was also to raise a use for the sole purpose of supporting a common recovery, which the court thought themselves bound to favor. But in our case, the consideration is express, *and falls within the maxim of *expressum facit cessare tacitum*, precluding all averment of a consideration inconsistent with it. I shall consider this power, then, as created by a covenant to stand seised to uses, and shall examine whether it is such a one as the rule will embrace.

Every declaration of a use, is, in some sort, an appointment ; (Co. Lit. 276, a, b, notes ;) but those only are technically so considered, where the power is first reserved or given, with a subsequent limitation of uses, to take effect until or in default of the appointment ; or where the uses are first limited, with the power of limiting others, which operates when executed as a revocation of the former. All the authorities I have been able to meet with, of powers determined to fall within the rules, have been of one or other of these descriptions. The one we are examining is of neither. There is no limitation expressly to take effect until or in default of an execution of the power ; no power of limiting new uses, which *shall of necessity* operate as a revocation of the former. For, had the power been executed by devise, instead of deed, the first uses would not have been revoked,

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though they would have been expended previous to the creation of the new uses. As no authorities are to be found extending the rule beyond a power of appointment, strictly and technically such, it warrants a presumption at least, that all others are exempt from its operation. This presumption is strengthened by a recurrence to the maxim "*all the powers being derived from equity, are, even in a court of law, to be construed equitably,*" (3 Burr. 1446,) so as to effectuate, if possible, the intent of the donor. I am, therefore, strongly inclined to think, this ought rather to be considered an authority to sell than a power to appoint. It may be objected, that it ought then to have been executed in the name of the donor. To this there are two answers: First, that an authority, coupled with an interest *may be executed [*398] in the name of the donee: Second, that the execution was pursuant, in this instance, to the letter of the authority which required it to be done under his hand and seal.

Another important consideration is, whether this rule extends to a power created for the sole benefit of the donee? On this point, I have met with no direct adjudication. The authorities I have examined relate, without exception, to cases of a different description. There is one, however, from which it may be inferred that such a power is not within the rule. The case I allude to is that of *Goodtitle v. Petto*, (Str. 934.) There A. in consideration of love and affection, and to make provision for his wife in case she survived him, covenanted to stand seised to the use of himself and her, for their joint lives, and the life of the survivor, remainder to the use of such person as she should think fit to dispose to. The court held, that because the appointment was not to be *for the benefit of the wife*, but that she had a naked power *for the benefit of strangers only*, the appointee could not take; clearly intimating it had been otherwise, had the power been to be created for her benefit.

Another inquiry, equally important, is, whether the conveyance of a freehold estate, coupled with a power to dis-

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pose of the fee, does not vest a qualified fee-simple in the donee of the power.

In *Jennot v. Hardie*, (1 Lev. 283,) lands were devised to E. for life, remainder to A. in tail, and on his dying without issue in the life of E. then to E. to dispose of at her pleasure. This was held to vest the fee-simple in E.

In *Whishon v. Clayton*, (1 Lev. 156,) the devise was to W. after the death of the testator's wife, and if he failed, then to the discretion of his father. This was held a fee-simple in the father.

In *Pearson v. Otway*, (2 Wils. 6,) the devise was to Agnes for life, and in case she should have no issue, [*399] *with power to dispose at her will and pleasure. This was held to vest a fee-simple in Agnes.

In *Bagshaw v. Spencer*, (1 Vesey, 142; 2 Atk. 577,) the devise to sell was held to carry the fee.

These, it may be said, are cases of devise, and that words in a will may create a fee, which cannot in a deed. This would, in a great measure, lessen their authority, were it not that the same latitude of construction is indulged on powers as on wills; for in each the intent of the party is to govern. The intent of parties who gave the powers ought to govern every construction, said Lord Mansfield, in *Taylor v. Horde*.

Another important view remaining to be taken of this point of the case is, to discover whether this power is not exempt from the operation of the rule, by means of the freehold interest vested in the donee of the power; and whether it embraces any other than naked or collateral powers. In the case at bar, the power, if such it may be called, as far forth as it might be executed by deed, was a power appendant; because of the interest which the donee had in the estate, as well as in the exercise of the power; and in such case it is held, that the person to whom the estate is limited by the execution of the power, is, in law, considered as coming in under him who executes the power, and not under him who creates it. (Powell on Powers, 12. Harg. Law Tracts, 415. 1 Co. 174, Digg's case.)

I am, therefore, of opinion, this power was well created.

The remaining question as to the execution of the power,

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I think, admits of little doubt. It was created expressly for the benefit of the donee, her heirs and assigns, and there is no restriction on the exercise of her discretion, in the adoption of such mode of execution as she should think best calculated to produce this effect. She was the best judge of the confidence her husband merited; and that her father was satisfied with the *disposition she made, [*400] and was probably privy and assenting to it, may fairly be inferred from his never having demanded rent during the fourteen years that he survived his daughter.

I am, therefore, of opinion, that the defendant is entitled to judgment.

RADCLIFF, J. not having heard the argument, gave no opinion.(b)

Judgment for the defendant.(c)

(b) LANSING, Ch. J. had left the bench, having been appointed Chancellor on the 28th October, during the term; and LEWIS, J. was on the same day appointed Chief Justice.

(c) Mr. Hilliard, in his Abridgment, observes, that "The rule in Shelly's case is undoubtedly in force in this country, as a settled principle of the English law, except where it has been changed by express statutes. In Connecticut, Michigan, New York and Ohio, the rule is abolished by statute. In New Jersey it is provided, that where there is a devise to one for life, remainder to his heirs, issue or the heirs of his body, the life estate is good, but after his death, the estate passes to his children or heirs. In Maine and Missouri, a devise, and in Maine, a deed, to one for life, then to his children or heirs or right heirs in fee, passes a life estate to the former, and a remainder in fee to the latter. In Rhode Island, the same construction is given to a devise for life, remainder to the children or issue in fee simple. In New Hampshire an express particular estate created by devise, is not enlarged by a subsequent devise to heirs or issue. In Massachusetts, a conveyance or devise to one for life, and after his death to his heirs in fee, or by words to that effect, gives him a life estate, and a remainder in fee to his heirs." (Hilliard's Am. Law of Real Property, 2d ed. vol. 1, p. 647.)

In England, this rule has been recently abrogated by act of parliament. Statute 3 & 4 Wm. IV. provides that a devise to the heir shall pass the estate to him as devisee, not by descent; and that a limitation by deed to the grantor or his heirs shall create a new estate by purchase; and where one takes by purchase or will, under a limitation to the heir or heirs of the body of the ancestor, the descent is to be traced, as if such ancestor had been the purchaser. (4 Kent, 228, n. Id. n. (b.))

Consult, upon the rule in Shelly's case, Hilliard's Am. Law of Real Pro-

The People v. Burtch.

THE PEOPLE *ex relat.* QUACKENBOSS *against* BURTCH.

An indictment for a forcible entry and detainer before two justices, having been removed by *certiorari* to this court, the defendants were served with a notice of a rule to *assign errors* in twenty days, and no assignment being made, a judgment by default was entered; and the defendants afterwards filed their plea. It was held, that the rule to assign errors was a nullity, and the judgment and all subsequent proceedings were set aside for irregularity.

The landlord may be let in to defend, in an action for a forcible entry and detainer, as well as in ejectment.

An indictment for a forcible entry and detainer was found against the defendant before two justices of the peace in Washington county. The defendant traversed the indictment by pleading not guilty,^(a) and possession for three years. Before the trial, the proceedings were removed into this court, by *certiorari*.

In June last, a notice was served on the defendants to *assign errors* in twenty days, or judgment. No errors having been assigned, a judgment by default was entered against the defendant in July term last. Afterwards the defendant filed a plea of not guilty, and possession for three years. The defendant did not assign errors, because the notice was not to *plead*, as well as to assign errors. The defendant [*401] states, that John Fort was landlord *of the ten-

perty, vol. 1, 627-647. 4 Kent's Comm. ed. 1844, p. 214, *et seq.* Coke on Litt. Thomas' ed. vol. 2, 143-150, and note p. Mr. Butler's note 10, p. 534. Mr. Preston's succinct view of the rule in Shelly's case, *passim*. Fearn's Cont. Rem. Eng. ed. 1844, vol. 1, 28-201, and n. l.; and see id. 694-703, index and references; see id. vol. 2, 206-248. 2 Jarman on Wills, Am. ed. 1845, p. 241-361. Crabb's Real Property, 987, 1405, 1617, 2350. Shepherd's Touchstone, Mr. Preston's ed. 414, n. 85. 2 Sugden on Powers, Am. ed. 1846, p. 24, *et seq.* Cruise's Dig. ed. 1806, p. 324, *et seq.*

(a) The traverse to an indictment for a forcible entry and detainer need not be in writing before a justice of the peace. There is nothing in the statute requiring it to be in writing; and though Hawkins says, (b. 1, c. 64, s. 58,) that it must be done in writing, and not by a bare denial of the force by parol, yet none of his authorities support the position, and it is against all the rules of pleading in criminal cases. (*The People v. Anthony*, 4 Johns. R. 198.)

The People v. Burch.

ant in possession of the premises ; and that the defendant had a good defence on the merits.

Woodworth, for the plaintiff, now moved to set aside the default, and all subsequent proceedings, including the writ of restitution.

Van Vechten, contra, read affidavits, stating that by articles of agreement between the defendant and Peter Fort, dated the 25th August, 1801, they acknowledged the prosecutor as owner of the land, and thereby surrendered the possession to Quackenboss, as the agent of the prosecutor, and acknowledged themselves tenants to hold for three months, and agreed to pay ten dollars rent. That the defendant had confessed the same, and disavowed any contract or privity with John Fort, who had declared his intention to relinquish all claim to the land.

Per Curiam. The rule to *assign errors* was a *nullity*. The record itself was removed by the *certiorari*, which presented an issue to be tried. If the defendant was to plead *de novo*, as it is said he is entitled to do, (and as was, in fact, done here,) the prosecutor ought to have called on the defendant to plead, or abide by his former pleas ; or if he was not so entitled, the prosecutor ought to have considered the cause at issue, and proceeded to trial. The proceedings of the prosecutor were therefore clearly irregular.

On the merits also, we are of opinion the proceedings ought to be set aside. Here is *color* for the suggestion that the defendant was tenant to John Fort ; at least the fact is litigated, and ought to be otherwise determined. This is an application to the equitable discretion of the court ; and those who stand behind the tenant may here, as in *ejectment* at common law, and independent of the statute, be received to defend the right. John Fort, claiming the premises as landlord of the defendant, and *the latter dis- [*402] claiming his title and attorning to another, are facts which may be tried in the present action, and ought to arrest any collusive proceedings between the prosecutor and the defendant. It is unnecessary here to say in what form the landlord may be admitted to defend ; but his right to

 De Hart v. Covenhoven.

make a defence, we think, is undoubted. It is therefore ordered, that the default, judgment, and all proceedings thereon, be set aside, and if a writ of restitution has been executed, that re-restitution be awarded. The motion must be granted.

Motion granted.(b)

 DE HART *against* COVENHOVEN.

A reference of a cause will not be granted, if it appears that law questions will arise.

BOGARDUS, for the plaintiff, moved for a reference of this cause, on the usual affidavit.

Morton, contra, read an affidavit, stating that several important questions of law would arise in the cause.

Per Curiam. As the trial will involve the decision of law questions, the motion must be denied.

Motion denied.(a)(b)

(b) See 3 Chitt. Crim. Law, ed. 1832, p. 1135, *et seq.* Bouv. Law Dic. h. t. Com. Dig. h. t. Bac. Ab. h. t. Peth. Proc. Civ. p. 2, c. 3, a. 3. Domat Supp. au Dr. Pub. l. 3, t. 4, a. 3. 1 Russell on Crimes, 304, *et seq.* Steph. Crim. Law, 83. 2 Hale's P. C., Phila. ed. 1847, 171, *et seq.* 213; vol. 1, 445.

(a) [Old note.] See *Low v. Hallett*, 3 Caines Rep. 82. *Adams v. Bayles*, 2 Johns. Rep. 374.

(b) See *Adams v. Bayles*, 2 Johns. Rep. 374. But the court must be satisfied that the questions will be of real difficulty. (*Anon.* 5 Cowen, 423. See also Graham's Practice, 2d ed. 572, and cases there cited.)

***KANE AND KANE against INGRAHAM. [*403]**

Where the principal in a cause had obtained his certificate of discharge under the bankrupt law of the United States before the bail had become fixed, the court ordered an *exoneretur* to be entered on the bail-piece. And bail are not considered as fixed, until after eight days in full term after the return of process against them, or within the time allowed for the surrender of the principal.

BOYD, in behalf of Phœnix, bail for the defendant, moved that an *exoneretur* be entered on the bail-piece in this cause, the defendant having obtained his certificate of discharge under the bankrupt law of the United States, of the 5th April, 1800.

The suit was commenced the 7th November, 1800; judgment was obtained, and a *ca. sa.* was issued, which was returned *non est inventus* the 21st July last. Pending this suit, the defendant committed an act of bankruptcy, and a commission having been issued against him, he obtained his certificate of discharge on the 21st August last. After his discharge, a suit was commenced against the bail, and the *capias* was returnable on the first day of this term.

Boyd cited 1 Burr. 244. Cowp. 823, 824. 1 Term Rep. 624. Col. Cas. 51, 60. 1 Bos. & Pul. 61.

Hopkins, contra, cited 2 Bl. Rep. 811, 812.

Per Curiam. By the act of congress of the 5th April, 1800, the bankrupt, on obtaining his certificate, is to be discharged from all debts owing by him when he became a bankrupt, and which might be proved under the commission. This debt is, no doubt, one of that description. The certificate of his discharge cannot be obtained, unless the commissioners certify that he has made a full discovery of his estate and effects, and in all things conformed to the act, or the judge of the district shall be of opinion that the certificate is unreasonably denied by the commissioners; and unless two-thirds of the creditors in value, coming in under the commission, shall consent to the allowance of the certificate,

Kane and Kane v. Ingham.

and such consent proved by the oath of the bankrupt to have been fairly obtained; and any of the creditors are entitled to be heard against the allowance of the certificate. Public notice of the bankruptcy is required to be given, and the creditors are fully apprised of the proceedings against him.

The act also provides, that if the bankrupt be arrested or prosecuted for any debt due before he became a bankrupt, he shall appear without bail, and may plead the general issue, and give the special matter in evidence; and it is declared that his certificate shall be *prima facie* evidence of his having conformed to the act, and the burthen of proving fraud or nonconformity shall lie on the plaintiff; and if the bankrupt be taken in execution or imprisoned on account of any such debt, he shall be discharged by *habeas corpus*.

In the present case no fraud appears to invalidate the discharge. It is not to be supposed that any existed, for the plaintiff has had an ample opportunity to show it against the allowance of the certificate; and the act expressly directs that the *onus probandi* shall afterwards be on him. A bare suggestion cannot be received as evidence of fraud. We are, therefore, to consider the certificate as fairly obtained; and if the defendant were in prison, he would be entitled to his discharge, on a *habeas corpus*. It is unnecessary to say what this court would collaterally do on the present motion, if fraud had been made to appear.

The only question is whether the bail is now in time to surrender. If he may surrender to prevent circuitry, the modern practice is, (Cowp. 823, 824; 1 Term Rep. 624,) to order an *exoneretur* at once to be entered. By the English law, the rule is that the bail cannot surrender their principal, being a certificated bankrupt, after they are fixed. *Woolley v. Cobb* and *Cockerill v. Owston*, (1 Burr. 244, 436, and 1 Term Rep. 624,) are decidedly to this effect. The

bail, in the sense of the authorities, are deemed to [*405] be *fixed*, when the *ca. sa.* against the principal is returned *non est*. If we apply this rule, the bail would here be fixed, and cannot surrender. But our

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courts in general have been liberal towards bail, and have considered the privilege within the period of grace as ripened into a matter of right. Thus they are held liable to interest, on the judgment against the principal, only from the expiration of the days of grace. That is a case quite as strong as the present, because there they are not only *fixed* in law, but have voluntarily waived the privilege of a subsequent surrender. And if no analogous case existed, we are inclined, in favor of bail, to adopt the rule that they are in no case definitively liable till the expiration of the eight days in full term after the return of process against them.

The bail in this case, would, therefore, be allowed to surrender; but as the principal would be immediately entitled to his discharge, the surrender would be an idle ceremony, entirely useless to the plaintiff, and attended with expense and inconvenience to both the defendant and his bail, we think the practice of entering an *exoneretur* ought to be pursued.

The motion must be granted.

Motion granted.(a)(b)

(a) [Old note.] See *Seaman v. Drake*, 1 Caines' Rep. 9. *Jones v. Emerson*, 1 Caines' Rep. 487. 2 Johns. Rep. 101. 4 Johns. Rep. 407.

(b) See *supra*, p. 284, n. (b,) to *Milner v. Green*, and references; *supra*, vol. 1, p. 329, n. (a) to *Strang v. Barber and Griffin*; *Ellis v. Hay*, 1 id. 333. *Brown v. Smith*, 9 Johns. Rep. 84. *Brownlow v. Forbes*, 2 id. 101. See also *Saunders v. Bobo*, 2 Bailey, 492. *Bailey v. Seals' Bail*, 1 Harrington, 369. *M'Glenscy v. M'Lea*, 466. *M'Cannland v. Waller*, 1 Harris & Johnson, 156. *M'King v. Marshall*, id. 101. *Champion v. Noyes*, 2 Massachusetts, 481. *Payson v. Payson*, 1 id. 292.

Hodges v. Suffelt.

[*406] *HODGES *against* SUFFELT.

In an action of debt on a bond conditioned for the performance of covenants, the plaintiff must assign *breaches*, and have the damages assessed, and may then enter judgment for the penalty *pro forma*, and issue execution for the damages and costs; and if the damages are assessed at *six cents*, he will be entitled to nominal damages for the detention of his debt, and may enter up judgment for the penalty so as to recover full costs.

VAN VECHTEN moved to set aside the judgment and execution in this cause, and for the costs of this action, in favor of the defendant. It was an action of debt on a bond, with a penalty, conditioned for the performance of covenants. The defendant pleaded performance, and at the trial the jury gave a verdict for *six cents* damages. A judgment was entered for the penalty with full costs, and execution issued to levy the six cents, with the full costs.

Foot, contra.

Per Curiam. The act, (see Rev. Laws, vol. 1, p. 349, 24 sess. c. 90,) is *compulsory* on the plaintiff in all cases within it. (2 Wils. 377. Cowp. 357. 5 Term Rep. 538, 540 to 636. 8 Term Rep. 127.) The jury, in this case, ought, therefore, to have assessed six cents damages for the detention of the debt, and that, on a judgment for the penalty, would have entitled the plaintiff to costs, and also damages for the *breaches* of the covenant under the act. It is understood that the six cents damages was meant by the jury for the breaches. If so, and the other six cents being of course, the judgment, *in form*, is still for the penalty, for the act says, "the judgment shall be entered as heretofore," &c. But the plaintiff can only recover on the execution the damages assessed; but as the judgment is for the penalty, he recovers full costs. If, then, the fact be, in this case, that on the record the damages are stated to be, only *for the detention of the debt*, there ought to be a *venire de novo*, as in *Drage v. Brand*, (2 Wils. 377,) and *Hardy v. Bern*, (5 Term Rep. 636.) But the notice, and the motion of the de-

 Fish v. Stoughton.

fendant is not for a *venire de novo*, but merely to be relieved against the *costs. We are not, therefore, [*407] *now* to inquire into the regularity of the entry on the record, the judgment being for the penalty, the costs follow of course. Nor would it avail the defendant, if he had moved for a *venire de novo* for *nominal* damages must *then* be given on the breaches, and the judgment being, *pro forma*, for the penalty, full costs would also be given. The motion must be denied.

Motion denied.(a)

 FISH against STOUGHTON.

Where A. a British subject became a naturalized citizen, and took the oaths of abjuration and allegiance to this state in 1784; and in 1795, took an oath of allegiance to the king of Spain, and was appointed a consul by the Spanish king, and continued to reside in New York, without ever changing his *domicil*; it was held, that he was still to be considered as an American citizen, and not an *alien* or Spanish subject.

PENDLETON, for the defendant, moved that all further proceedings in this cause be stayed; that the cause be removed to the circuit court of the United States, and the bail discharged. He read the defendant's petition and affidavit.

Boyd, contra.

It appeared that the defendant was originally a British subject, and became a naturalized citizen of this state in 1784, and has ever since continued to reside in New York. He has, since his naturalization, been appointed a consul for Spain, and taken an oath of allegiance to the king of Spain.

Per Curiam. The defendant was originally a British

(a) [Old note.] See *Caverley v. Nichols and Brown*, 4 Johns. Rep. 189. *Van Benthuyzen v. Dewitt and another*, 4 Johns. Rep. 213. [Add: see *Munro v. Allaire*, 2 Caines' Rep. 320. See *Graham's Prac.* 2d ed. 717, 718.

 Graham v. Adams and Adams.

subject, and by an act of the legislature was made [*408] a naturalized *citizen of this state, and must have then in 1784 taken an oath of allegiance to this state. In 1795 he took an oath of allegiance to the king of Spain, and was appointed by the Spanish king, his consul for this state, and has since been appointed consul-general for the United States. In this situation, he claims to be an *alien*, and, as such, entitled to the privilege of being sued in the courts of the United States. We are of opinion that he has no title to that privilege; and without deciding on the general right of expatriation,^(a) that he cannot be considered as having divested himself of the character of an American citizen; for he cannot divest himself of that character without, at least, changing his *domicil*. While he continues to reside here, we have a right to consider him as a citizen of this state. If a different rule should prevail, it would be in the power of the sovereign of any other nation thus to naturalize any of our citizens; and in the heart of our country, to detach them from the allegiance they owe to its government. The motion must be denied.

Motion denied.

 GRAHAM *against* ADAMS AND ADAMS.

Where the defendant in a cause is sentenced to the state prison *for life*, he is considered as *civilly dead*, and the suit is abated.

THE defendants in this cause having both been sentenced to the state prison *for life*, the court decided that they were to be considered as *civilly dead*, and that the suit had therefore abated.

Judgment for the defendants.^(b)

(a) This question is considered, and the English and American authorities examined in 2 Kent Comm. ed. 1832, 39-50.

(b) See Co. Litt. 130, a. 3 Inst. 215. 4 Blacks. Comm. 332. 4 Vin. Ab. 152. Wood's Inst. Code Civ. art. 22 a 25. *Platner v. Sherwood*, 6 Johns. Ch. Rep. 118. *Troup v. Wood and Sherwood*, 4 id. 228, 247, 248.

 Bank of New York v. Livingston.

*CLAPP *against* REYNOLDS and another. [*409]

Where the plaintiff recovers 250 dollars of debt, and damages for the detention, on a single bill, he is entitled to the full costs of this court.

THE plaintiff recovered 250 dollars debt, on a single bill, and also damages, for the detention, including interest as costs. The question was whether he was entitled to full costs.

Per Curiam. The plaintiff is entitled to full costs. The act deprives him of full costs, when he recovers a sum not exceeding 100 pounds, exclusive of costs. The recovery here exceeds that sum; and in form as well as reality, the judgment applies to the damages as well as to the debt.

Judgment accordingly.(a)

THE PRESIDENT AND DIRECTORS OF THE BANK OF
NEW YORK *against* LIVINGSTON.

Where A. by writing for a valuable consideration, guarantied the payment of a sum of money by B. to C. and B. on demand, refused to pay at the time, and C. gave notice to A. of the failure of payment, and demanded the amount of him, it was held, that the demand of payment of B. and refusal by him, and notice thereof to A. were sufficient to entitle C. to recover against A. on his guaranty, without a previous suit against B.

THIS was an action on the case, brought upon a contract as follows: "Whereas the bank of New York has agreed to lend the committee appointed to superintend the building of a new theatre, a sum not exceeding 25,000 dollars, for nine months, at the interest of six per cent. for the purpose of completing the theatre, on condition that satisfactory security be given for the repayment of the said loan: we, the sub-

(a) See Grah. Prac. 2d ed. 717, *et seq.*

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scribers, wishing to facilitate the completion of the [*410] said theatre, do hereby agree to guaranty *to the bank of New York, the repayment of the loan above mentioned, with the interest in proportion to the sums affixed to our names respectively." Dated, &c. (Signed,) John R. Livingston, for 1000 dollars, and by others.

At the trial, the advancement of the loan by the plaintiffs was proved ; when the same became due, the committee were called upon by the plaintiffs for payment, which was refused, as they had no funds. The plaintiffs then gave notice in writing to the defendant of such refusal, and required of him the payment of the sum affixed to his name, agreeably to the contract. A verdict was found for the plaintiffs, with the interest.

E. Livingston, for the defendant, now moved to set aside the verdict, and for a new trial. He contended that the plaintiffs, before they could be entitled to an action against the defendant, ought to have sued the committee, to whom the credit was given by the plaintiffs.

Harison, contra.

Per Curiam. The members of the committee were mere agents in this transaction, and there was no necessity of suing them. The defendant absolutely guarantied the payment of the sum subscribed by him. He stands as surety at least, and is liable, in the first instance, to the plaintiffs. It is unnecessary to decide whether the plaintiffs could maintain an action against the agents. If they could, the defendant is collaterally liable, and the plaintiffs have done all that was necessary to make the defendant responsible.

Motion denied.(a)

(a) See Theobald on Principal and Surety, 1, 2, 45, *et seq.* Pitman on Principal and Surety, 26, *et seq.* Burge on Principal and Surety, 40, *et seq.*

Judah and others v. Kemp.

*JUDAH and others *against* KEMP. [*411]

Where A. shipped goods by B. the master of a vessel at London for New York, and the consignee assigned the bill of lading to C. who demanded the goods and tendered a sum of money for the freight, but whether enough did not appear; B. refused to deliver the goods, assigning as a reason that he was ordered by the ship-owners not to deliver them, and made no objection as to the tender of the freight; in an action of trover against B. it was held, that he had waived any tender of the freight; and that his refusal was evidence of a conversion.

THIS was an action of *trover* for goods shipped by one of the plaintiffs, residing in London, on board of the ship *Factor*, of which the defendant was master, for New York. The ship arrived at New York on the 22d of December, 1799, and on the next day the consignee assigned the bill of lading to the plaintiffs, who are partners, some of whom reside in New York. The endorsement on the bill of lading was as follows: "For value received, I assign the cases and goods within mentioned to Benjamin S. Judah and brothers or order. 23d December, 1799. N. Judah." The goods were entered at the custom house by the plaintiffs, and a permit for landing them obtained, and delivered by them to the custom house officer.

On the 3d January, 1800, the plaintiffs demanded the goods of the defendant, who refused to deliver them, alleging that he had orders from the ship-owners not to deliver them. At the time of the demand, a sum of money was tendered to the defendant for the freight, but whether it was equal to the freight or not, did not appear; nor was the permit then shown or presented to the defendant.

It appeared that the goods had been previously sold by the ship-owners, and that the permit was in the hands of the custom house officer when the goods were landed, who did not observe the persons who took away the goods.

A verdict was taken for the plaintiffs, subject to the opinion of the court, on a case containing the above facts.

The counsel for the defendants, contended, 1. That the

 Judah and others v. Kemp.

assignment endorsed on the bills of lading, and the delivery thereof, did not transfer the property so as to support this action. 2. That the plaintiffs did not show that the freight had been tendered. 3. That the permit to [*412] *land the goods ought to have been presented to the defendant.

B. Livingston, for the plaintiffs.

Hamilton, contra.

Per Curiam. When the defendant refused to deliver the goods on the ground that his owners had ordered him not to deliver them, a tender of the freight was not necessary. The plaintiffs, however, did tender a sum of money for freight, though the amount does not appear ; but as the defendant did not make any demand of freight, nor object to the tender, it was sufficient. The goods were not detained by the defendant on the ground of his *lien*, but for a different reason, which amounted to a waiver of the tender.(a) His refusal, therefore, is evidence of a conversion, and the plaintiffs are entitled to judgment.(b)

Judgment for the plaintiffs.

(a) See note to *Coit v. Houston*, *infra*, vol. 3, p. 243.

(b) The books are so full of cases confirmatory of this principle, that no references are needed. See, however, Archbold's *Nisi Prius*, 457, 458. 3 Stephens' N. P. 2682, *et seq.* 3 Harrison's Dig. Am. ed. 1846, p. 6405, *et seq.* 5 id. 1702, *et seq.* 4 New York Digest (Clerke's) ed. 1845, p. 1159. Minot's Dig. 684, *et seq.* 3 United States Digest, 587, *et seq.* 2 Supplement to United States Dig. 878, *et seq.*

CASES
ADJUDGED IN THE
COURT FOR THE CORRECTION OF ERRORS
IN THE
STATE OF NEW YORK,
IN MARCH, 1800, AND FEBRUARY, 1801.

CHARLES NEWKIRK AND WIFE, EXECUTRIX OF PETER SCHUYLER, DECEASED, *Appellants, against* EDWARD S. WILLETT, *Respondent.*

The executors of S. filed a bill in chancery against W. setting forth that W. had commenced a suit at law against them for a debt pretended to be due from the testator, of which they had no knowledge, and which they had strong ground to believe was unjust, and that they could not safely proceed to trial without a discovery from W. of all the facts relative to the origin and state of such pretended debt, and praying for an answer and an injunction. An injunction was allowed by one of the masters of the court of chancery, which, afterwards, was ordered, by the chancellor, to be dissolved; and on an appeal from this order, it was held that the bill did not contain sufficient equity to entitle the plaintiff to a discovery, and that the order for the injunction was properly dissolved.

The court of chancery will not enforce a discovery unless the party calling therefor will state some material matter of fact which he wishes to substantiate by the confession of the other party. *Per Kent, J.*

ON the 18th day of April, 1799, the appellants filed a bill in chancery, setting forth that the testator died in the winter, 1792, and left the appellant, Gertruyd Newkirk, his widow and executrix. That soon after the respondent demanded a considerable sum of money, which she refused to pay;

Newkirk and Wife v. Willett.

that the respondent thereupon offered to submit the
[*414] controversy to arbitration, which she *also refused ;
and thereupon in April, 1793, and after her inter-
marriage with the appellant, Charles Newkirk, the respon-
dent commenced a suit against them in the supreme court,
for 1000*l.* for money pretended to be due to him from the
said Schuyler ; that the appellants did not, of their own
knowledge, know any thing of the said demand ; but had
strong grounds to believe the same to be unjust, because the
respondent had not, during the life of the said Schuyler, taken
measures to adjust his claim, and because he did possess any
vouchers to establish the justice of his demand. That the
relations and accounts given by the respondent were incon-
sistent and various, and that the appellants being unac-
quainted with the origin of the pretended debt, could not,
without a discovery by the respondent of all the facts, safely
proceed to a trial of the suit : And that the respondent
might, until he should have fully answered to the said facts
and interrogatories stated in the said bill, be enjoined from
proceeding to a trial at law in the said suit, the appellants
prayed an injunction, which was accordingly issued, on the
certificate of one of the masters of chancery, that, in his opi-
nion, it ought to issue ; which certificate was founded on
the affidavit of the appellant, Charles Newkirk, annexed to
the bill.

Fourteen days previous to the filing of the above bill, viz.
on the 5th April, 1799, the appellants had filed a bill against
the respondent, (in substance the same as the *second* bill,) to
which the respondent had put in his answer before the *se-*
cond bill was filed ; in which answer the respondent states
that in the year 1786 or 1787, he was possessed of certifi-
cates or public securities amounting to 800*l.* and upwards,
besides interest, which he, at the solicitation of the said
Schuyler, delivered to him, on his promise to lay them out
for the respondent's use in the purchase of forfeited lands ;
that he had several times applied to the said Schuyler, in his
lifetime, but without success, to render an account
[*415] and come to a *settlement for the certificates ; and

that at the last time of applying to Schuyler at Johnstown, he declared that he had sent his certificates to New York with his wife, *the above appellant*, to be disposed of, and that on her return he would pay the respondent for the same.

The *first* bill, to which an answer was filed, was on the 14th day of December, 1799, ordered by the chancellor to be dismissed.

On the 4th day of January, 1800, the chancellor, after hearing the arguments of counsel for both parties, *ordered* the injunction issued on the *second* bill to be dissolved; from which *order* the present appeal was made to this court.

Spencer and Riggs, for the appellants.

P. W. Yates and Lush, for the respondent.

KENT, J. This is an appeal from an interlocutory order of the court of chancery, dissolving an injunction without any answer being put in to the bill.

The two most material points which were raised on the argument upon this appeal, were these :

1st. Is an order, dissolving an injunction, one of the orders of the court below upon which an appeal will lie ?

2d. Did the bill contain sufficient equity to entitle the appellants to a discovery, and consequently, to an injunction, to stay proceedings at law, in the mean time ?

To determine the first question satisfactorily, and to draw the exact line of distinction between that class of orders arising in the progress of a cause, which are susceptible of review by appeal, and that class of orders from which no appeal lies, (and such a distinction must and does exist,) would require a more deliberate examination, than, at this late hour of the court, so near the close of the session, I have had time to bestow. (a) I shall, *therefore, give no [*416] opinion on the first point, nor is it necessary, in the present instance, to the rights of the parties; because, admitting an appeal to lie upon the order, I am of opinion on the second question, that the injunction was properly dissolved. The bill does not state sufficient equity to entitle the appel-

(a) See 1 Johns. Cas 436. 3 Johns. Rep. 549, 566. 4 Johns. Rep. 410.

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lants to a discovery. It states, generally, that the respondent had made a demand upon one of the appellants as executrix of Peter Schuyler, deceased; and that, as he did not produce any voucher, she had refused to pay him. It states further, that he proposed an arbitration, which she refused, and that finally, he had brought a suit against the appellants in the supreme court. The bill states further that the appellants knew nothing of the demand of their own knowledge, but that they believe it unjust, because the respondent took no measures to liquidate and settle it in the lifetime of Peter Schuyler, and does not now produce any vouchers, and has been inconsistent in what he has from time to time said as to the nature and extent of his demand.

This is the substance of the bill. It amounts to this: the respondent has sued us at law, and we do not know for what, and, therefore, we ask for a discovery before-hand, although we have reason to conclude he has sued us upon some groundless pretence. Such a bill shows no equity, no right to a discovery.

It sets forth no matter material to a defence at law, and which cannot be proved, unless by the confession of the opposite party. (2 Vesey, 445, 492. 3 Fonb. 484. 1 Vern. 399.) It is, to use Lord Chancellor Hardwicke's expression, a mere fishing bill, seeking generally a discovery of the grounds of the respondent's demand, without stating any right to entitle them to it. Such a bill may be exhibited by an executor or administrator, and indeed by any defendant who is not already in possession of the plaintiff's proofs.

[*417] *But the court of chancery has wisely refused to sustain bills for discovery, in such latitude; and unless the party calling for a discovery will state some matter of fact material to his defence, and which he wishes to substantiate by the confession of the defendant, the court will not enforce a discovery.

I am, accordingly, of opinion, that the appellants in the present case were not entitled to a discovery, and that the injunction staying the suit at law was properly dissolved;

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and that the order for that purpose ought to be affirmed ; and further, that the appellants pay to the respondent his costs of the appeal to be taxed.

Such being the unanimous opinion of the court, it was, therefore, ORDERED, ADJUDGED and DECREED, that the order of the chancellor be affirmed, with costs.

Judgment of affirmance.(b)

JOHN WOODWORTH AND WAIT RATHBUN, *Appellants*,
against ELIJAH JANES, JAMES DOLE AND ELI JUDSON,
Respondents.

A. claiming title under the Connecticut Susquehannah Company to land situate in the state of Pennsylvania, and claimed by that state, sold the land to B. who gave his notes for the purchase money, part of which was paid ; and A. executed to B. a *quit-claim* deed for the land. B. afterwards filed his bill in chancery, praying that A. might be perpetually enjoined from assigning the notes, or proceeding at law to recover the amount ; and that the money paid might be refunded ; it was held, that the sale was *maintenance*, in selling a *pretended* title, and that both parties being *in pari delicto*, a court of equity would not relieve either ; and the bill was, therefore, dismissed.

The individual states having submitted their territorial claims to the *judiciary* of the United States are to be so far considered as having ceded their sovereignty, and as corporations ; and their right to transfer land must be judged of by the same rules of common law as the rights of other persons, natural or politic.

ON the 6th May, 1799, the appellants filed their bill in the court of chancery against the respondents, setting forth, among other things, that the Connecticut Susquehannah Company claim title to a tract of land, commonly called the Connecticut Susquehannah Com- [418]

(b) This case is also reported in 2 Caines' Cases in Error, p. 296. In confirmation of the principle of the case, see Story's Eq. Pl. ed. 1844, § 325 ; 2 Story's Eq. Jur. ed. 1846, § 1483, *et seq.* and notes ; Mitford's Eq. Pl. Am. ed. 1840, 191, 192, and notes ; *Frietas v. Don Santos*, 1 Yonng & Jerv. 577 ; Danell's Ch. Pl. and Prac. p. 645, 821, and references.

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pany Purchase, situate in the counties of Northumberland, Northampton and Luzerne, in the commonwealth of Pennsylvania, and within and under the jurisdiction of the said commonwealth; that the claim of the state of Connecticut had been uniformly opposed and denied by the commonwealth of Pennsylvania; and that, in order to deter any person or persons from making entry, or taking possession of the said lands, or any part thereof, under pretence of title derived from Connecticut, the legislature of that commonwealth, on or about the 11th day of April, 1795, passed an act entitled "an act to prevent intrusions on lands in the counties of Northampton, Northumberland and Luzerne," imposing the penalty of 200 dollars fine, and imprisonment not exceeding twelve months, on any person or persons, that, under color or pretence of title derived from Connecticut, should take possession of, enter, intrude or settle any of the said lands, situate within the said counties and commonwealth of Pennsylvania; and further, that every person who should combine or conspire for the purpose of conveying, possessing or settling on any of the said lands, under any such pretended title, or for the purpose of laying out townships, by persons not appointed or acknowledged by the said commonwealth, should, for every such offence, forfeit a sum not less than 500 dollars nor more than 1000, and be subject to imprisonment at hard labor not exceeding eighteen months, as the court in their discretion might direct; that Elijah Janes and James Dole, two of the respondents, pretending that they were the owners, or had regular title from the state of Connecticut, for two-third parts of a certain township of land known by the name of Janes, containing in the whole 16,000 acres of land, being part of the lands claimed by Connecticut and within the jurisdiction [419] of the commonwealth of Pennsylvania, sold to the appellants the said two-thirds of the said township, for 1000 pounds, current money of the state of New York; that on the 4th day of May, 1796, the said Elijah Janes and James Dole, by a certain indenture, sealed with their seals, and bearing date the day and year last aforesaid, bargained,

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released, and for ever quit-claimed unto the appellants, all their right and title to two equal undivided third parts of the said township; and for the sole consideration aforesaid, the appellants executed to the said Elijah Janes and James Dole their three promissory notes; one note for 333 pounds 6 shillings and 8 pence, payable on the 7th day of April, 1797; one other note for the like sum, payable on the 7th day of April, 1798; and one other note for the like sum, payable on the 7th day of April, 1799; which several notes bore interest from the 7th day of April, 1796; that the appellants were wholly ignorant, and had never been advised, of the existence of the said act of the commonwealth of Pennsylvania, or of any of the penalties or restrictions therein contained, at the time of executing the said conveyance or giving the said notes; that the equal half of the two first notes mentioned were duly paid soon after they became due, but without any knowledge on the part of the appellants of the existence of the said statute of Pennsylvania; that the said Elijah Janes and James Dole endorsed the said second note to Eli Judson, one of the respondents, and shortly thereafter the said John Woodworth was called on for payment of the other half of the said last mentioned note; and, not having the money, in order to save costs, consented to execute a warrant of attorney, authorizing a judgment to be entered against him in favor of the said Eli Judson, for the balance then remaining due on the said note, at the April term of the supreme court, 1799, which was accordingly entered in the term of April for the sum of 530 dollars and 68 cents, being the amount of principal, interest and costs: *that the said Eli Judson was merely a nominal [*420] plaintiff, and was to account to the said Elijah Janes and James Dole for the avails of the note.

The appellants prayed an injunction against further proceedings at law, that the said Elijah Janes and James Dole might be restrained from negotiating the note thirdly payable; that the money so paid might be refunded, and for general relief.

To this bill the respondents answered, by stating, that the

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respondents, Janes and Dole, in the winter of the year 1795, having been informed that the appellant, Wait Rathbun, was interested in the Connecticut Susquehannah Company Purchase, applied to him for information respecting it; and being assured by him of the validity of the title, on his expressing an inclination to be concerned in extensive purchases of those lands, and regretting his inability to procure the necessary sums of money, they entered into an agreement with him, the terms of which were, that he should make the purchases, and have a reasonable allowance made for his services, the necessary advances to be made by them; that each should be entitled to one-third part of the lands, each paying one-third part of all moneys expended; that the appellant, Rathbun, then proceeded in his purchases, and having obtained a sufficient number of rights, applied to certain persons appointed as commissioners to the Susquehannah Company, resident on the lands, and on producing proof that the rights were genuine, received a grant in fee-simple, to himself and the respondents, Janes and Dole, for a township, distinguished by the name of "Janes," containing 16,000 acres; and a final adjustment and settlement of the concern between the respondents, Janes and Dole, and the appellant, Rathbun, was then made; that the appellant, Rathbun, having sold his one-third part of the township to a certain Jonas Morgan, for 310 pounds, applied in the month of April, 1796, to Janes and Dole, for the purchase

[*421] *of the two remaining third parts, which they agreed to quit-claim to him for the sum of 1000 pounds; but refusing to accept his notes without further security for the payment, Rathbun, with the appellant, John Woodworth, offered to take the lands in the manner and upon the terms proposed, and give their joint notes for the payment of the purchase money; which proposal being accepted by the respondents, Janes and Dole, they executed a release and quit-claim to the appellants, and received from them three promissory notes, payable at different periods, for the amount of the consideration money; that the appellant, Woodworth, paid the one-half part of the moneys secured by two of the

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notes as they became due, and there remained due on the second note, on the 7th day of April, 1799, the sum of 511 dollars and 56 cents; this note, after it became payable, was endorsed by the respondents, Janes and Dole, to the other respondent, Eli Judson, merely for the purpose of using his name in the recovery; from an apprehension, as the respondent, James Dole, was sheriff of the county of Rensselaer where the appellants reside, that some inconvenience might otherwise arise from this circumstance in conducting a suit, if it should be necessary; that on the 7th day of April, 1799, the appellant, John Woodworth, executed a warrant of attorney, authorizing a judgment to be entered in the supreme court of judicature of this state in favor of the respondent, Eli Judson, for the above sum of 511 dollars and 56 cents, by virtue whereof a judgment was accordingly entered.

The plaintiff replied, and put the cause at issue, and rules for the examination of witnesses and for publication were entered, but no witnesses were examined on either side. The cause was heard on the bill and answer on the 18th December, 1799, and the act of Pennsylvania, mentioned in the pleadings, was read at the hearing. The chancellor decreed, that the bill of the *appellants should be [*422] dismissed with costs. And to reverse that decree the present appeal was brought.

The counsel for the appellants insisted :

1. That no legal, valuable or good consideration was ever received by the appellants from the respondents for the notes; and, therefore, that the several sums of money so received by the respondents, ought, from principles of justice and equity, to be refunded.

2. The contract and sale mentioned and set forth in the bill, and admitted by the answer, conveyed no manner of right and title to the appellants; and, by the laws of the commonwealth of Pennsylvania, the exercise of an act of ownership, under the pretended title of Connecticut, is highly criminal, and expressly prohibited under severe penalties.

3. That to permit such contracts and sales, and to sanc-

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tion them in courts of justice, is against all principles of public policy.

4. Although the money paid on the first and second notes was voluntary, yet it was without a knowledge of the laws of Pennsylvania ; and at all events, if paid with a full knowledge, the injustice and inequity of retaining it, now fully appears.

The cause was argued by *Emott* and *Spencer*, for the appellants, and by *Hoffman*, Attorney General, *Lush* and *Riggs*, for the respondents.

The opinion of the court was, in substance, as follows :

Per Curiam. This is to be regarded as a case of *maintenance*, in buying and selling a pretended title. The respondents, claiming under Connecticut, sold lands within the actual jurisdiction of Pennsylvania, and held *adversely* by that state. The respondents state that both parties *knew* that a controversy existed between the different claimants under the two states ; and that in consequence [*423] of such controversy the lands were *quit-claimed* for 23 cents per acre, when they were, in fact, worth two dollars an acre. The prayer of the appellants is, that the respondents may refund the money which they have received, and be perpetually enjoined from taking out execution on the judgment, and from assigning or suing the third note.

The individual states have submitted their interfering territorial claims to the judiciary of the United States, and, in respect to those rights, are to be deemed to have ceded their sovereignty to the United States, and to be so far considered as corporations. Their rights to pass land must be judged of by the same rules of common law as the rights of other persons, natural or politic ; and before they can convey land held *adversely*, they must reduce their right to possession by suit. Conveyances, otherwise, are acts of maintenance, and are no consideration for a contract. The vendee in the present case purchased *knowingly*, and was therefore in equal fault ; and the rule, that *in pari delicto potior est conditio possidentis*, must be applied to them ; and a court of

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equity will not relieve either, but leave them to pursue their remedies (if any they have) at law.

The decree of the chancellor was, therefore, right in dismissing the bill, and the same must be affirmed. Each party must pay his own costs in the court below, and on the appeal.

Judgment affirmed.(a)(b)

***WILLIAM ARMSTRONG AND GEORGE BARNWALL, [*424]**
Appellants, against ROBERT GILCHRIST, Re-
spondent.

Where A. had received from B. the note of C. to collect, and C. being reputed insolvent, and having absconded, D. in behalf of C. offered to pay A. 13 shillings and 4 pence in the pound, for the debt, and this proposal being communicated to B. he made no objection, and A. afterwards settled the note with D. at that rate; it was held, that A. was not responsible to B. for

(a) [Old note.] The above is the substance of the opinion as delivered by Mr. Justice Benson, in which the majority of the court concurred. Benson, J., Kent, J. and Radcliff, J. were of opinion that the court, being in possession of the merits of the cause, in order to prevent further litigation, ought to have modified the decree, so as perpetually to enjoin the respondents from assigning or suing on the note; but Lewis, J. and a majority were for affirming the decree as it stood. (See *Whitaker v. Cone*, ante, 58.)

(b) See Bro. Max. 325, and authorities cited in the notes. The maxim, *In pari delicto potior est conditio possidentis* applies to actions brought to recover money paid on a fraudulent contract by a party to the fraud, as upon an unlawful bet, insurance, gambling or stock contract, or in consideration of the composition of a felony, or upon a contract in violation of the statute against champerty and maintenance, or upon the sale of an office. The principal is illustrated in a body of cases too numerous to be cited. A few of these, however, are given. (*Best v. Strong*, 2 Wend. 319. *M'Cullum v. Gourlay*, 8 Johns. R. 147. *Rust v. Gott*, 9 Cow. 169. *Burt v. Place*, 6 id. 431. *Greenwood v. Curtiss*, 6 Mass. 381. *Pearson v. Lord*, id. 84. *Barnard v. Crane*, 1 Tyler, 457. *Babcock v. Thompson*, 3 Pickering, 446. *Worcester v. Eaton*, 11 Massachusetts, 368. *Denny v. Lincoln*, 5 id. 385. *Merwin v. Huntington*, 2 Conn. 209. *Perkins v. Eaton*, 3 New Hamp. 152. *Groton v. Waldborough*, 2 Fairf. 306. *Livingston v. Wooters*, 1 Nott & M'Cord, 175.)

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more than the sum he received of D. the silence of B. amounting to an assent to the proposal, and a ratification of the act of A.

Where a court of chancery has acquired cognizance of a suit for the purpose of discovery or an injunction, it may, if in full possession of the merits, retain the suit, in order to do complete justice between the parties, and to prevent useless litigation and expense.

Where A. gave a note to B. for stock deliverable on the 1st of May, 1792, and C. having guarantied the performance of the contract, compounded with B. in March, and took up the note, and afterwards brought his action against A. for the amount, it was held that C. had a right to settle with B. and take up the note before it was due, and that A. was bound to pay him the amount of the shares, according to their value, on the 1st of May, 1792.

THE respondent, in October, 1797, commenced a suit in the supreme court of this state, against the appellants, in the name of Hezekiah B. Pierpont, to recover to the use of the respondent the value of 15 half shares of the national bank stock of the United States, due on an instrument of writing, given by the appellants to Pierpont, which the respondent had endorsed at the instance and request of the appellants, as their guarantee. The respondent, some time after, and before the same became due, purchased from Pierpont the note or contract for the consideration of 4290 dollars. The suit at law being at issue and noticed for trial, the appellants filed their bill in the court of chancery against the respondent, in which they stated, that in February, 1792, they were stockbrokers, and received from William Duer a note for the delivery of forty half shares of the bank stock of the United States on the 1st day of May then next following, which delivery was guarantied by Walter Livingston, now deceased, and which shares they, the appellants, were directed to sell; that they sold 15 of the said half shares to Hezekiah B. Pierpont and 25 to Louis Simond, and gave their note to Pierpont to deliver the same on the 1st day of May aforesaid, which note was guarantied by the respondent; that the moneys received by the appellants upon [*425] such sales were paid by them to William Duer, and that to secure the respondent for his guarantee, they placed in his hands the aforesaid note endorsed by Walter Livingston, for 40 half shares, and gave him up the note so endorsed by him; that the respondent also compounded with

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Pierpont for the 15 half shares deliverable as aforesaid, and that the respondent was in possession of the said note. The appellants further charged in their bill, that Walter Livingston was solvent when the respondent settled with them as aforesaid ; that the respondent had commenced a suit at law in the name of Hezekiah B. Pierpont to recover from the appellants the value of 15 half shares, mentioned in the note given to Pierpont, without crediting the appellants for the amount of the 40 half shares received from Walter Livingston. The appellants concluded by praying an injunction to stay the suit at law commenced by the respondent against them.

The respondent, in his answer, admitted the appellants to be stockholders, and that they became possessed of the note of Walter Livingston as they had stated, but the respondent averred that the note was drawn by one Isaac Whippo, as the maker, and the shares made deliverable to the said Walter Livingston, and was endorsed by him in blank ; that he was ignorant of any directions the appellants received when they became possessed of the said note ; that the respondent, being in habits of strict intimacy with the appellants, was induced, from motives of friendship only, to guaranty the several notes or contracts of the appellants, to deliver 15 half shares of the stock to Pierpont and 25 to Simond ; that when he became their guarantee, they informed him of their holding the note endorsed by Walter Livingston, which would enable them to pay Pierpont's and Simond's notes ; that he was ignorant of what moneys the appellants paid William Duer ; that on the 24th *March, 1792, the [*426] respondent purchased from Pierpont the note for 15 half shares which the respondent had guarantied, for which he paid Pierpont 4290 dollars in cash ; that upon this note the respondent instituted the suit at law above mentioned against the appellants to recover the amount thereof. The respondent further stated, that a few days before the 1st day of May, 1792, he lent the appellants 20 shares of the said stock, and as much cash as was sufficient to purchase five more, to enable them to take up the note held by Simond ;

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that before the 1st of May, 1792, Isaac Whippo and Walter Livingston absconded, to avoid their creditors, and were generally reputed insolvent, and so continued ; that after the 1st day of May, 1792, the note endorsed by Walter Livingston having been protested for non-payment, he received the same from the appellants, to be recovered for the use of the appellants ; that the respondent thereupon united with several of the creditors of Walter Livingston, and obtained process against him as an absconding debtor ; that upon such proceedings being had, Henry Livingston, the brother of Walter Livingston, made overtures to the creditors of Walter Livingston, to compromise their debts, and that the respondent and the other creditors, under an impression of their inability to recover the same from Walter Livingston, settled their demands with Henry Livingston, the brother of Walter, at 13 shillings and 4 pence in the pound, for which they accepted notes payable at different periods, which have since been paid. The respondent further declared that he was positive he had communicated to the appellants, before the said compromise, the state of Walter Livingston's circumstances, and the proposed terms of compromise ; that he is sure they made no objections thereto, and that better terms of settlement could not have been obtained from Walter Livingston during his lifetime, nor from his executors since his death ; that the [*427] value of the said 15 *half shares due him on the note given to Pierpont, and of the 25 shares lent by him to the appellants, were still due to him from the appellants, deducting therefrom the money the respondent received from Walter Livingston's brother.

The depositions of three witnesses were read at the hearing, which stated, that in April or May, 1792, the witnesses were creditors, one of them of Walter Livingston, and one of them of Walter Livingston and Isaac Whippo ; that at that time Walter Livingston and Isaac Whippo absconded or concealed themselves, to avoid being arrested by their creditors, and were generally reputed insolvent ; that under these circumstances, they were, with many other creditors of Walter Livingston, induced to make a compromise with

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Henry Livingston, the brother of Walter Livingston, and accepted from him 13 shillings and 4 pence in the pound, for their respective debts; that Isaac Whippo was still insolvent, and that during the time in question the appellants and the respondent were in habits of great intimacy with each other, and that the respondent often endorsed the appellants' paper.

It was agreed between the counsel for the plaintiffs and the respondent, that the only point in dispute between the parties was, whether the respondent should account with the appellants for the full value of the said 40 half shares mentioned in the note, or contract, endorsed by Walter Livingston; or whether, in settling the account between the parties, the appellants were to be credited by the respondent, only for the money so received by him, upon the compromise made with Henry Livingston.

The chancellor decreed, that the appellants should pay to the respondent, the value of the 40 shares of the bank stock of the United States, with interest from the 1st day of May, 1792, deducting, nevertheless, therefrom, the money received by the respondent upon the *note for 40 half [*428] shares of the like stock, endorsed by the said Walter Livingston, with interest from the time the same was received by the respondent; and that it should be referred to a master, to state the account between the parties accordingly; and that the suit at law should be discontinued, and each party should pay his own costs. The matter being thereupon referred to a master, a report was made by him, which was confirmed, stating, that upon the principles mentioned in the decree, there was due to the respondent from the appellants the sum of 6032 dollars and 63 cents.

From this decree the present appeal was entered, and which the appellants contended was erroneous:

1. Because there was no evidence that Gilchrist had compromised.
2. Because Gilchrist had no right to compound, and look to A. and B. for the deficiency.
3. Because interest was allowed.

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4. Because, as an action was pending at law, between Pierpont and the appellants, the chancellor, in case he did not think them entitled to have the contract cancelled, ought only to have dismissed the bill, and let the damages be assessed by a jury.

The respondent, on the contrary, insisted that the decree and orders were right and just, and ought to be affirmed :

1. Because it appeared that the appellants, on the 1st day of May, 1792, justly owed the respondent the value of 40 shares of the bank stock of the United States.

2. That the appellants, being thus indebted, put into the respondent's hands the note endorsed by Walter Livingston, for 40 half shares of the like stock, to be recovered after the said note had been protested, and the maker and endorser had absconded.

3. That the respondent made immediate efforts to recover the amount of the note ; and under an impression then generally prevalent, of the insolvency of [*429] *Walter Livingston, concurred with his creditors generally in a compromise at 13 shillings and 4 pence in the pound ; in which compromise the respondent acted with good faith, and the best intentions towards the appellants ; that better terms of settlement could not have been made then nor since ; and that the respondent has given the appellants credit for the moneys received by him, and has only recovered, by the decree, the balance due.

4. That the respondent's answer is conclusive evidence that the appellants approved the compromise ; but that without such evidence, it is a rational conclusion that such was the fact, from the strict intimacy subsisting between the parties ; besides, from the nature of the case, the respondent had an implied right to make such settlement as in his judgment was deemed eligible, provided he acted with good faith.

5. Admitting Walter Livingston to have been solvent, still the compromise was advisable, because the respondent was informed by several eminent counsel, that Walter Livingston was not responsible in law or equity upon the note in

question, it not being a negotiable paper, and therefore could not be endorsed in blank, so as to charge the endorser.

The cause was argued by *B. Livingston*, for the appellants, and *Troup*, for the respondent.

RADCLIFF, J. 1. The respondent paid the money on the notes guaranteed by him for his own indemnity. He stood in the character of surety; and having paid the money for his principals, he was entitled to receive it again, with interest from the time of payment.

With regard to the notes of Whippo endorsed by Walter Livingston, there is no evidence that he acted without authority in compromising with the latter at 13 shillings and 4 pence in the pound. On the contrary, the respondent, in his answer in chancery, swears, that he communicated *the negotiations of the creditors of Walter Li- [*430] vingston to the appellants; that he has no doubt but the latter assented to the terms which were made, and is certain they made no objection, and that he and they were in habits of intimacy at the time.(a) The answer in this

(a) *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*, or as it is expressed in *Lawrence v. Taylor*, (5 Hill, 107, 113,) an adoptive authority relates back to the time of the original transaction, and is deemed in law the same to all purposes as if it had been given before. Mr. Dunlap, in his learned notes to Paley on Agency, has so fully considered this subject as to supersede the necessity of any further investigation. "The doctrine on this subject is stated, as usual, with clearness and precision in Liv. Pr. & Ag. vol. 1, p. 44, *et seq.* The author says: 'If I make a contract in the name of a person, who has not given me an authority, he will be under no obligation to ratify it, nor will he be bound to the performance of it. But if, with full knowledge of what I have done, he ratify the act, he will be considered to have contracted originally by my agency; for the ratification is equivalent to an original authority, according to the maxim that *omnis ratihabitio mandato æquiparatur*. The effect of a ratification is also to subject the principal to the same obligations to his agent, as if the latter had been expressly employed to do the business.' 'It is not necessary that there should be an express act of ratification, in order to oblige the principal to the performance of the contract, or to subject him to the obligation of indemnifying his agent; but his subsequent assent may be inferred from circumstances, which the law considers equivalent to an express ratification.'— Another effect of ratification is to discharge the agent from the responsibility to his principal, which he has incurred by improper management of the business entrusted to him, or by disobedience of or-

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particular must be received as evidence until disproved, and of course the respondent cannot be deemed responsible for

dora.' Again, vol. 1, p. 391: 'We have seen in a former chapter that the subsequent assent of the principal will confirm the unauthorized acts of the agent, so that the former will be bound by them in respect to third persons. The same rule applies to the agent's responsibility. He will be released from any claim against him for damages by any act of his principal which amounts to a confirmation of what has been done.' (And see *Willinks v. Hollingsworth*, 6 Wheat. 79. *London and Birmingham Railway Co. v. Winter*, Cr. & Ph. 57. *Towle v. Stevenson*, 1 Johns. Cas. 110. *Randal v. Van Vechten*, 19 Johns. Rep. 60. *Skinner v. Dayton*, id. 554. *Rogers v. Kneeland*, 13 Wend. 114. S. C. 10 Wend. 219. *Loraine v. Cartwright*, 3 Wash. C. C. Rep. 154. *Cushman v. Loker*, 2 Mass. Rep. 106. *Prothingham v. Haley*, 3 Mass. Rep. 70. *Clement v. Jones*, 12 Mass. Rep. 65. *Odiorns v. Maxcy*, 13 Mass. Rep. 182. *Pratt v. Putnam*, id. 361. *Fisher v. Willard*, id. 381. *Corning v. Southland*, 3 Hill, 552. *Moss v. The Rossie Lead Mining Co.* 5 Hill. 137. *Schimmelpennick v. Bayard*, 1 Peters, 264.) The principle of recognition is not affected by any question arising out of the statute of frauds. 'An authority, by adopting the transaction, may as well be conferred where the question of agency arises under the statute of frauds, as under the common law.' (Cowan J. *Lawrence v. Taylor*, 5 Hill, 113. *Davis v. Shields*, 24 Wend. 325.) But to render the assent of the principal effectual, it must be with full knowledge of the facts.

"The acts of the principal are to be construed liberally in favor of an adoption of the acts of an agent. (1 Liv. Pr. & Ag. 394. *Codwise v. Hacker*, 1 Caines' Rep. 526.)

"A person executing an instrument in the name of another, assuming to be his agent, but having in fact no authority for that purpose, does not exempt himself from personal liability to the person with whom he undertook to contract, by the subsequent ratification of the assumed principal. (*Palmer v. Stephens*, 1 Denio, 471. *Rossiter v. Rossiter*, 8 Wend. 494.)

"Where A. does an act as agent for B. without any communication with C., C. cannot by afterwards adopting that act, make A. his agent, and thereby incur any liability, or take any benefit under the act of A. (*Wilson v. Turnman*, 6 Mann. & Gran. 236.) In that case, (p 242, Tindal, C. J. delivering the judgment of the court, says: 'The seizure of the plaintiff's goods'—this was an action of trespass *de bonis asportatis*—'was made by some officers of the sheriff, without any precedent authority from Turnman, who appeared upon the evidence at the trial to be a plaintiff in some suit, the nature of which did not transpire, but who is found by the jury not to have given any precedent authority to take the goods of the plaintiffs, but to have ratified the taking after it was made. The question, therefore, is a dry question of law, whether the subsequent ratification by the defendant, of a taking under such circumstances, is the same, in its consequences, as a precedent command of the defendant. And we think, under the authorities, and the nature

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more than the real amount he received from the notes endorsed by Walter Livingston, as he acted therein as the

of the thing itself, that it is not.—That an act done, *for another*, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from the same act done by his *previous* authority. Such was the precise distinction taken in the Year Book, (H. 7, H. 4, fo. 24, pl. 1)—that if the bailiff took the heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority as bailiff at the time. The same distinction is also laid down by Anderson, C. J. in Godbelt's Reports, 109: 'If one have cause to distrain my goods, and a stranger, of his own wrong without any warrant or authority given him by the other, takes my goods, not as bailiff or servant to the other, and I bring an action of trespass against him, can he excuse himself by saying that he did it as his bailiff or servant? Can he also father his misdemeanor upon another? He cannot; for once he was a trespasser, and his intent was manifest.'—[In the present case the sheriff's officers who were the original trespassers by taking the goods of the plaintiff, were not servants or agents of the defendant Turman, but the agents of a public officer or minister obeying the mandate of a court of justice. They did not assume to act at the time as agents or bailiffs of the then plaintiff Turman, but they acted as the servants of another, viz. the sheriff, by virtue of the process directed to him by the court. And this forms the distinction between the present case, and that of *Parsons v. Lloyd*, (3 Wils. 341,) relied upon in the argument. If the defendant Turman had directed the sheriff to take the goods of the present plaintiff, under a valid writ, requiring him to take the goods of another person than the defendant in the original action, such previous direction would undoubtedly have made him a trespasser. But where the sheriff acting under a valid writ by command of the court, and as the servant of the court seizes the wrong person's goods, a subsequent declaration by the plaintiff in the original action, ratifying and approving the taking, cannot, upon the distinction above taken, alter the character of the original taking, and make it a wrongful taking by the plaintiff in the original action.]

"It is evident that there can be no stronger ratification of the act of an agent, than the principal's availing himself of the benefit of such act, although unauthorized; and that in like manner, a person by availing himself of the act of one whom he had not originally appointed his agent, must be deemed retrospectively to have created the agency from which he derives a profit. In either case, the presumed ratification subjects the principal to the same liabilities to third persons or to the agent, as if the latter had, in the one case, acted within the scope of his powers; or in the other, had been a duly consti-

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agent of the appellants, and by their authority. The difference between the sum so received and the amount of the

tuted agent. Where bills were drawn by a supercargo, whose authority to that extent might be doubtful, for the purpose of purchasing a cargo, on the principals and others, to be paid by the principals, who receive the cargo, and dispose of it to a very considerable profit; Marshall, C. J. said: 'Can they now be permitted in a court of conscience to question the authority by which the bills were drawn?' (*Clark's Ex'rs v. Van Riemsdyck*, 9 Cranch, 153.) Where a factor was authorized to sell goods at a limited price, and he afterwards sold them below that price, and sent an account to his principal of the sales and prices, authorized him to draw for the balance of the account, and the principal received the account and drew for the balance, and made no objections in his letters, or otherwise, to the conduct of the factor in the sales; it was held that his conduct amounted to a ratification of the factor's proceeding. (*Richmond Manufacturing Co. v. Starks*, 4 Mason, 296.) So, by bringing a suit against the agent to recover the proceeds of an unauthorized sale, the principal ratifies his act in making the sale. (*The President of the Hartford Bank v. Barry*, 17 Mass. R. 97. See *Smith v. The Birmingham, &c. Gas Light Co.* 1 Ad. & Ell. 526. *Skinner v. Dayton*, 19 Johns. Rep. 554. *Forrestier v. Bordman*, 1 Story's Rep. 43. *Bell v. Cunningham*, 3 Peters, 69. *The Episcopal Charitable Society v. The Episcopal Church in Dedham*, 1 Pick, 372. *Copeland v. The Mercantile Ins. Co.* 6 Pick. 203. *Skiras v. Morris*, 8 Cowen, 60.)

"In a case in which it was sought to recover upon a bill of exchange accepted in the defendant's name by his agent, it was held that where no express authority is proved authorizing the agent to bind the principal in the manner he is sought to be charged, but such authority is presumed from the previous conduct of the party recognizing such acts as binding on him, it will be necessary to show that the instrument was taken on the faith of such previous recognition of authority in the agent to bind the principal. (*St. John v. Redmond*, 9 Porter's (Alabama) Rep. 428." Dunlap's ed. of Paley on Agency, 171, n. (o.) See also *id.* n. (p.))

"The assent or acquiescence, by which the principal shall be bound, must be given with knowledge, or the means of acquiring knowledge of all the circumstances of the case.—A ratification of the unauthorized acts of an attorney in fact without a full knowledge of all the facts connected with those acts, is not binding on the principal. No doctrine is better settled, on principle and authority, than this, that the ratification of the act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is invalid, because founded on mistake or fraud. (*Owings v. Giddings*, 9 Peters, 603, 629. *Davidson v. Stanley*, 2 Mann. & Gr. 721.) If the principal, after a knowledge that his orders have been violated by his agent, receives merchandize purchased for him contrary to orders, and sells the same without signifying any intention of disavowing the acts of

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moneys paid by him as their surety, must, therefore, be the measure of his demand.

2. The chancellor did right in proceeding to decree on the merits. The whole case was before him, and a court of law must proceed by the same rule, as to the amount of the respondent's recovery. There could, therefore, be no use in

the agent, an inference in favor of the ratification of the acts of the agent may fairly be drawn by the jury; but if the merchandize was received by the principal, under a just confidence that his order to his agent had been faithfully executed, such an inference would be in a high degree unreasonable. (*Bell v. Cunningham*, 3 Peters, 69.)

"When the principal is informed of what has been done, he must dissent, and give notice of it within a reasonable time; and if he does not, his assent and ratification will be presumed. (2 Kent's Comm. 616. 1 Liv. Pr. & Ag. 396. *Benedict v. Smith*, 10 Paige, 127.) Therefore, where the principals received a letter from the agent, in July, informing them of what he had done, and they were silent until October, and then for the first time complained; they were considered to have waived any right of action which they may have had. (*Cairnes v. Blecker*, 12 Johns. Rep. 300.) The following case stated by Emerigon, *Traité des Assurances*, vol. 1, p. 144, is cited, 2 Kent's Comm. 615; 1 Liv. Pr. & Ag. 49.—A merchant in Palermo, wrote to a house in Marseilles, that he had shipped goods consigned to them, to be sold on his account. The ship being out of time, the consignees at Marseilles caused the cargo to be insured on account of their friend at Palermo, and gave him advice of it. He received the letter, and made no reply, and the vessel arriving safe, he refused to account for the premium paid by the consignees, under the pretence that they had insured without orders. But the reception of the letter, and the subsequent silence, were deemed by the law merchant equivalent to a ratification of the act.—(See further, *Murray v. Toland*, 3 Johns. Ch. Rep. 369, 374. *Vianna v. Barclay*, 3 Cowen, 281. *Parkhurst v. Imlay*, 15 Wend. 235. *Erick v. Johnson*, 6 Mass. Rep. 196. *Shaw v. Nudd*, 8 Pick. 9. *Benedict v. Smith*, 10 Paige, 130. *Bredin v. Dubarry*, 14 Serg. & Rawle, 30. *Richmond Manufacturing Co. v. Starks*, 4 Mason, 296.)

"On the other hand, the agent may forfeit his right of construing the silence of his principal as an implied acquiescence, by his own neglect in furnishing the latter with requisite information in due time. Parker, C. J. says: 'The cases of ratification are, where the agent has gone beyond or besides his authority, for the benefit, as he supposes, of his principal, and gives him immediate notice. In such case, silence is construed acquiescence and ratification. But a delay of intelligence, until an election to approve or disapprove would be attended with no advantage to the principal, defeats the right to construe silence into ratification.' (*Amory v. Hamilton*, 17 Mass. Rep. 109." Dunlap's ed. of Paley on Agency, 172, n. (q.))

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sending it again to be tried at law ; and it would be attended with unnecessary litigation and expense. The appellants ought not to complain of a decision on the whole merits. They sought their remedy in chancery, and cannot seek it in parcels. Although their bill prayed an injunction and specific relief only, the chancellor had a right to decide against the whole relief sought, and to decree in favor of the defendants, and was not confined to any one specific object stated in the bill. The whole case was before him, and it was his right and his duty to decide definitively between the parties.

I am, therefore, of opinion, that the decree ought to be affirmed.

KENT, J. 1. I admit that the respondent, by taking the note of Whippo, endorsed by Walter Livingston, to collect for the use of the appellants, had no authority to sell it at a depreciated rate ; but having received propositions [*431] from Henry Livingston to pay the note at the *rate of 13 shillings and 4 pence in the pound, and Walter Livingston being generally reputed insolvent, and process actually awarded against him as an absconding debtor ; and the respondent having communicated, (as appears by his answer,) the propositions made by Henry Livingston to the appellants, who made no objections to them, they must, I think, be considered as having assented to, or ratified the same. And the maxim is *omnis ratihabitio mandato æquiparatur*. The intimacy between the parties, and their long silence, confirm this conclusion. The respondent is answerable, then, for the note to the amount of 13 shillings and 4 pence in the pound, according to the chancellor's decree.

2. The court of chancery having acquired cognizance of a suit, for the purpose of discovery or injunction, will, in most cases of account, whenever it is in full possession of the merits, and has sufficient materials before it, retain the suit, in order to do complete justice between the parties, and to prevent useless litigation and expense. (3 Atk. 263. Cases in Ch. 40. Fonb. Eq. 12.)

3. It appears to be admitted by the appellants, that the

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respondent paid for them, as guarantee, to the amount of 40 shares, 25 of which he advanced on or about the 1st of May, 1792; and though he took up Pierpont's note in March preceding for 4290 dollars; yet the appellants were not obliged to pay until May, nor the respondent to take up the note till that time.

The price of the stock in May, ought, therefore, to be the criterion, for, perhaps, the respondent may have paid a higher price in March. I do not think it a gambling act in the respondent to take up the note prior to May. Prudence, and his own security, may have dictated such a measure.

I am, therefore, for affirming the decree.

*A majority of the court being of the same opinion, it was, thereupon, ORDERED, ADJUDGED and DECREED, that the decree of the court of chancery be affirmed.

Judgment of affirmance.(b)

(b) Mr. Justice Story, in commenting upon that class of cases where the question is considered how far a court of equity will retain a suit for the purpose of administering complete justice between the parties, after having acquired cognizance of it for the purpose of discovery, remarks: "In America, a strong disposition has been shown to follow out a convenient and uniform principle of jurisdiction, and to adhere to that which seems formerly, (as we have seen,) to have received the approbation of Lord Nottingham. (Story's Eq. Jur. § 65, n. (3.) Id. § 691.) The principle is, that, where the jurisdiction once attaches for discovery; and the discovery is actually obtained, the court will farther entertain the bill for relief, if the plaintiff prays it. This has been broadly asserted in many cases, and certainly possesses the recommendation of simplicity and uniformity of application; and escapes from what seems to be the capricious and unintelligible line of demarkation, pointed out in the English authorities. Thus, it has been laid down in the courts of New York, upon more than one occasion, as a settled rule, that when the court of chancery has gained jurisdiction of a cause for one purpose, it may retain it generally for relief. (*Rathbone v. Warren*, 10 Johns. Rep. 587, 596. *King v. Baldwin*, 17 Johns. Rep. 384. See also *Leroy v. Veeder*, 1 Johns. Cas. 417. S. C. 2 Caines' Cas. in Err. 175. *Hepburn v. Dundas*, 1 Wheat. Rep. 197. *Ludlow v. Simond*, 2 Caines' Err. 1, 38, 51, 52.) A similar doctrine has been asserted in other states; (*Chichester's Executor v. Vass' Administrator*, 1 Munf. Rep. 98; *Isham v. Gilbert*, 3 Connect. Rep. 166; *Ferguson v. Waters*, 3 Bibb, 303; *Middletown Bank v. Russ*, 3 Conn. Rep. 139;) and it has been affirmed in the supreme court of the United States. On one occasion, it was laid down by the last named court, 'That if certain facts essential to

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CORNELIUS RAY, JOHN LANSING, JUN. AND CORNELIA,
HIS WIFE, *Appellants, against* ANN BOGART, CORNE-
LIUS N. BOGART, DAVID S. BOGART, HELENA BOGART,
AND CARY LUDLOW, *Respondents.*

Where A. B. and C. entered into partnership in trade, in 1767, and continued business until May, 1774, when B. died, and the partnership was thereby dissolved, and C. afterwards died in 1782, and A. in 1788, without the partnership accounts having been settled; and in 1794, the representatives of A. filed a bill in chancery against the representatives of the other partners, for an examination and settlement of accounts, and for the payment of a balance claimed; the court dismissed the bill on account of the lapse of time and the death of the parties, considering it as a stale demand.

HENRY C. BOGART, Robert Ray and Daniel Stiles, some time in the year 1757 entered into partnership for the pur-

the merits of a claim purely legal, be exclusively within the knowledge of the party, against whom that claim is asserted, he may be required in a court of chancery to disclose those facts; and the court, being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy.' (*Russell v. Clarke's Executors*, 7 Cranch, 69.)

"This doctrine, however, though generally true, is not to be deemed of universal application. (*Middletown Bank v. Russ*, 3 Conn. Rep. 135, 140. Id. 166.) To justify a court of equity in granting relief, as consequent upon discovery, in cases of this sort, it seems necessary, that the relief should be of such a nature, as a court of equity may properly grant in the ordinary exercise of its authority. If, therefore, the proper relief be by an award of damages, which can alone be ascertained by a jury, there may be a strong reason for declining the exercise of the jurisdiction, since it is the appropriate function of a court of law to superintend such trials. And, in many other cases, where a question arises, purely of matters of fact, fit to be tried by a jury, and the relief is dependent upon that question, there is equal reason that the jurisdiction for relief should be altogether declined; or, at all events, that if the bill is retained, a trial at law should be directed by the court, and relief granted or withheld, according to the final issue of the trial. Thus, if a bill seeks the discovery of a contract for the sale of goods and chattels, or of a wrongful conversion of goods and chattels, and the breach of the contract, or the conversion of the goods and chattels, is properly remediable in damages, to be ascertained by a jury, the relief seems properly to belong to a court of law. In like manner, questions of fraud in obtaining and executing a will of real estate, and many cases of controverted titles to real estate, dependent partly on matters of fact and partly on matters of law, are properly triable in an

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pose of merchandising and distilling. It was virtually agreed between them, that they should equally divide the profits, and bear the loss arising from the business.

Robert Ray conducted the business in his own name, for

ejection, and may well be left to the common tribunals. (*Jones v. Jones*, 3 Meriv. Rep. 161.) And it has accordingly been laid down in some of the American courts, that, under such circumstances, where the verdict of a jury is necessary to ascertain the extent of the relief, the plaintiff should be left to his action at law after the discovery is obtained. (*Lynch v. Sumrall*, 1 Marsh Kentucky Rep. 469.)

"The distinction here pointed out furnishes a clear line for the exercise of equity jurisdiction in cases where relief is sought upon bills of discovery; and, if it should receive a general sanction in the American courts, it will greatly diminish the embarrassments which have hitherto attended many investigations of the subject. In the present state of the authorities, however, little more can be absolutely affirmed than these propositions: first, that in bills of discovery seeking relief, if any part of the relief sought be of an equitable nature, the court will retain the bill for complete relief; secondly, that in matters of account, fraud, mistake and accident the jurisdiction for relief will, generally, but not universally, be retained and favored; and thirdly, that in cases where the remedy at law is more appropriate than the remedy in equity, or the verdict of a jury is indispensable to the relief sought, the jurisdiction will either be declined, or if retained, will be so subject to a trial at law.

"From what has been already stated, it is manifest that the jurisdiction in cases of this sort, attaches in equity solely on the ground of discovery. If therefore, the discovery is not obtained, or it is used as a mere pretence to give jurisdiction, it would be a gross abuse to entertain the suit in equity, when the whole foundation on which it rests is either disproved or it is shown to be a colorable disguise for the purpose of changing the forum of litigation. Hence, to maintain the jurisdiction for relief, as consequent on discovery, it is necessary, in the first place, to allege in the bill that the facts are material to the plaintiff's case, and that the discovery of them by the defendant is indispensable as proof; for if the facts lie within the knowledge of witnesses, who may be called in a court of law, that furnishes a sufficient reason for a court of equity to refuse its aid. The bill must, therefore allege, (and if required the fact must be established,) that the plaintiff is unable to prove such facts by other testimony. (*Gelston v. Hoyt*, 1 Johns. Ch. Rep. 543. *Seymour v. Seymour*, 4 Johns. Ch. Rep. 409. *Pryor v. Adams*, 1 Call Rep. 382. *Duval v. Ross*, 2 Munf. Rep. 290, 296. *Bass v. Bass*, 4 H. & Munf. 478.) In the next place, if the answer wholly denies the matters of fact, of which discovery is sought by the bill, the latter must be dismissed; for the jurisdiction substantially fails by such a denial. (*Russell v. Clark's Executors*, 7 Cranch, 69. *Ferguson v. Waters*, 3 Bibb's Rep. 303. *Nourse v. Gregory*, 3 Litt. 378. *Robinson v. Gilbraith*, 4 Bibb's Rep. 184." 1 Story's Comm. on Eq. Jur. ed. 1846, §§ 71, 72, 73, 74.)

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the account of the partnership, from the commencement of the firm until the 13th October, 1773.

Some time after the commencement of the business, but how long is uncertain, a dispute having arisen between Robert Ray and Henry C. Bogart, on account of the former charging a commission for being the active partner, amounting to a considerable sum, on which Henry C. Bogart offered to take the management of the business upon himself without commission ; and accordingly Ray, on the 13th day of October, 1773, resigned to Bogart the care of their concerns.

Henry C. Bogart continued the active partner without an allowance therefor, until the time of his death, which happened some time in the month of May, 1774.

[*433] *Cornelius Bogart, father of Henry C. Bogart, and Nicholas C. Bogart, brother of Henry, were appointed executors by the will of Henry C. Bogart, and continued to reside in the city of New York, where Robert Ray also resided, until some time in the year 1776, when they were exiled, in consequence of an invasion by the British forces. But Nicholas C. Bogart never qualified as an executor ; Cornelius Bogart took possession of the whole estate ; and paid the debts which came to his knowledge.

Robert Ray lived about eighteen years after the death of H. C. Bogart, and during the greater part of that time in the same family with Cornelius Bogart.

Upon the termination of the war, Cornelius Bogart and Robert Ray returned to the city of New York. Cornelius Bogart died in 1793, at the age of 93 years or upwards, intestate.

The accounts between the estate of Robert Ray and H. C. Bogart respectively showed a balance against each other ; but the accounts thereof exhibited by H. C. Bogart have not been produced by the appellants ; and neither those accounts nor the materials from which they have been composed, have ever been in the possession of the respondents, or either of them.

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The co-partnership was dissolved in the month of May, 1774, by the death of H. C. Bogart.

Daniel Stiles died in 1782; and his widow, and sole acting executrix, afterwards, died.

Robert Ray died in the year 1788, having made the appellants, Cornelius Ray and Cornelia, since married to John Lansing, jun. his executors. The appellants averred, that Robert Ray, on the 10th February, 1775, exhibited an account of his partnership transactions. And in a paper, which they allege to be a copy of that account, it appears, that the said Robert Ray charged 807*l.* 13*s.* for commissions, by him claimed, for transacting the partnership business, and by the same account, *Robert Ray states a balance [*434] of 113*l.* 8*s.* 6*d.* to have been due to him.

In the same account are charges against the co-partnership, to the amount of 449*l.* 4*s.* 4*d.* for money alleged to have been advanced by Robert Ray at different periods, after he had ceased to be the active partner, to Daniel Stiles, for securing the payment of which sums, Robert Ray took promissory notes, in his own name, from Daniel Stiles.

Differences arose between H. C. Bogart, in his life-time, and the said R. Ray, respecting these accounts; but how these differences were adjusted, or if not adjusted, why no settlement thereof was made, did not appear. The books of the co-partnership have been preserved in a perfect state; and at the time of filing the bill, were in the hands of one of the witnesses in the cause.

In the year 1794, the appellants filed their bill, to compel an examination and settlement of the accounts of the co-partnership, claiming a balance to be due to them, in the manner before stated.

The respondents, by their answer, declared their utter ignorance of the matters in question; the death of all the parties therein concerned, and the death of all the executors of two of the parties, to wit, of D. Stiles and H. C. Bogart, and the great lapse of time; and insisted that under such circumstances they ought not to be compelled to an examination of those accounts.

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On the hearing of the cause, his honor the chancellor was pleased to dismiss the bill, principally on account of the great and unnecessary delay and lapse of time, the death of parties, and the probable loss and destruction of papers.

From this decree, the appellants appealed to this court, for the following reasons :

[*435] *1. By the act of law, no absolute bar is opposed to the opening and adjusting of accounts, except what is created by the statute of limitations. Every party claiming the benefit of this bar must either plead it, or insist upon it in his answer. Neither of which has been done by any of the respondents in this cause.

2. Length of time forms no absolute bar to the opening and adjusting of accounts, but only raises a presumption that accounts sought to be opened and adjusted, have in fact been settled, and that the balance struck on such settlement, has been paid to the person entitled to receive it. This presumption, like all other presumptions, will prevail, until repelled by stronger evidence, and no longer ; according to the maxim, *stabitur præsumptioni donec probetur in contrarium*. On this point, the rule of law and the rule of equity are precisely the same.

3. The presumption of settlement and payment, arising from the length of time in this cause, is repelled by the following circumstances :

1. The death of Henry C. Bogart just before the war began.

2. The intervention of the war, and the disorder it occasioned.

3. The removal of the parties from the city of New York, and their continuance without the city during the war.

4. The delicate situation in which some of the parties were placed, with respect to each other, by the nearness of their relationship, and the habits of friendship and intimacy in which they lived.

5. The extreme old age of Cornelius Bogart and his probable unfitness for the investigation and settlement of the accounts in controversy.

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6. The account rendered to one of the appellants, by Nicholas C. Bogart, after the death of his father, Cornelius Bogart.

*7. No inconvenience can result to the respondents [*436] from an examination of the accounts, as the books of the co-partnership have been preserved in a perfect state. They can be commanded and must control the settlement. It cannot be a disadvantage to the respondents that the books have come to the hands of Henry C. Bogart, from those of his father, Cornelius Bogart.

8. In this view of the cause, it is supposed that no sound principle of public policy forbids the examination and adjustment of the accounts in question.

Troup and Harison, for the appellants, cited 2 Ves. 482; 1 Atk. 493; Cowp. 108, 109; 1 Term Rep. 270; 1 Fonb. Eq. 322, 324; 1 Ves. 331; 1 Vin. 186; 2 Atk. 632.

Evertson and Burr, contra, cited 2 P. Wms. 144; 2 Vern. 276; 3 Atk. 106, 107; Bunb. 217; 2 Eq. Cas. Abr. 578.

KENT, J. Rejecting the period from May, 1775, to May, 1784, as being no reasonable time for the settlement of accounts in chancery, then, from the dissolution of the co-partnership, by the death of H. C. Bogart, in May, 1774, to the exhibition of the bill in June, 1794, is but 11 years.

Where there is a *mutual trust*, as between co-partners, I very much doubt whether the statute of limitations applies. (1 Atk. 494. 1 Fonb. Eq. 322.) If it does apply to such a case, then it must either be pleaded or insisted on in the *answer*, or it is waived. The rule of pleading in law and equity is equally strict. (1 Atk. 494. 2 Ves. 483.) The respondents insist only upon the lapse of so many years, and the death of so many parties; an objection which goes only to the *staleness* of the demand and the presumptions arising therefrom.

*A court of chancery, though the statute is not [*437] insisted on, will always exercise its discretion, in dismissing stale demands, on the ground of an unreasonable lapse of time. But I have never met with an instance in which the court has dismissed a demand on this ground,

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where only 11 years had elapsed, and when it appeared that no settlement had ever been made. There is a late case, (4 Bro. C. C. 264 to 270,) where Lord Kenyon would not suffer an account to be taken where the party had patiently slept over his demand for 33 years. There is another case in the exchequer, (Bunb. 217,) where the court would not suffer one partner to recover a balance against another, after 24 years. In another instance, (2 Bro. C. C. 62,) the court refused to open at large, an account, which had been *settled* for ten years, though certain *items* were suffered to go to the master. In other cases I find accounts have been suffered to be taken after 16, 32, and 33 years. (1 Atk. 493. 2 Ves. 483. 1 Vin. 156.)

In the present case, there was, in fact, a real *laches* only for 11 years, and there never having been a *settlement* of the accounts, and finding no instance in which the rule has been so rigorously applied, I am willing, though the presumption may be against the account, to let the experiment be made before a master, and for that purpose, I think the decree ought to be reversed.

BENSON, J. and VAN VECHTEN, S. were of the same opinion.

LANSING, Ch. J. and LEWIS J. gave no opinion.

RADCLIFF, J. was absent.

But a majority of the court being of opinion that the decree was correct, on the ground of the demand being on [*438] an old and stale account, which, under the *circumstances, ought not to be inquired into; it was thereupon ORDERED, ADJUDGED and DECREED, that the decree of the court of chancery be *affirmed*.

Judgment of affirmance.(a)

(a) Mr. Justice Story discusses the principle of this case as follows:—"It is, too, a most material ground, in all bills for an account, to ascertain, whether they are brought to open and correct errors in the account *recenti facto*; or whether the application is made after a great lapse of time. In cases of this sort, where the demand is strictly of a legal nature, or might be cognizable at law, courts of equity govern themselves by the same limitations, as to entertaining such suits, as are prescribed by the statute of limitations in re-

Murray v. Gouverneur and others.

JOHN B. MURRAY, *Appellant, against* ISAAC GOUVERNEUR, PETER KEMBLE, AND SAMUEL GOUVERNEUR, *Respondents.*

A bill of exchange given for a precedent debt is not *payment*, unless expressly agreed so to be by the parties.

Where A. contracted to sell a house and lot to B. and C. purchased of B. all his right, &c. it was held, that C. though a *bona fide* purchaser, without notice, must take the property subject to all the equity existing between the original parties, A. and B.

An action for *mesne profits* is an equitable suit, in which every equitable defence may be set up.

IN the year 1796, the respondents, Isaac Gouverneur and Peter Kemble, together with Joseph Gouverneur, (since de-

gard to suits in courts of common law in matters of account. If, therefore, the ordinary limitation of such suits at law be six years, courts of equity will follow the same period of limitation. (*Hovenden v. Lord Annesley*, 2 Sch. & Lefr. 629. *Smith v. Clay*, 3 Brown Ch. Rep. 639, n.) In so doing, they do not act, in cases of this sort, (that is, in matters of concurrent jurisdiction,) so much upon the ground of analogy to the statute of limitations, as positively in obedience to such statute. (*Hovenden v. Lord Annesley*, 2 Sch. & Lefr. 629, 630, 631. *Spring v. Gray*, 5 Mason's Rep. 527, 528. *Sherwood v. Sutton*, 5 Mason's Rep. 143, 146. Story's Eq. Jur. § 55 a.) But where the demand is not of a legal nature, but is purely equitable, or where the bar of the statute is inapplicable, courts of equity have another rule, founded, sometimes upon the analogies of the law, where such analogy exists, and sometimes upon its own inherent doctrine, not to entertain stale or antiquated demands, and not to encourage laches and negligence. (*Sherman v. Sherman*, 2 Vern. Rep. 576. S. C. 1 Eq. Abridg. 12. *Bridges v. Mitchill*, Bunb. 217. S. C. Gilb. Eq. Rep. 217. *Foster v. Hodgson*, 19 Ves. 180, 184. *Sturt v. Mellish*, 2 Atk. 610. *Pomfret v. Lord Windsor*, 2 Ves. 472, 476, 477. *Bond v. Hopkins*, 1 Sch. & Lefr. 428. *Smith v. Clay*, Amb. Rep. 647. 3 Bro. Ch. Rep. 639, note. *Stackhouse v. Barnston*, 10 Ves. 466, 467. *Moore v. White*, 6 Johns. Ch. Rep. 360. *Rayner v. Pearsall*, 3 Johns. Ch. Rep. 578. *Ellison v. Moffat*, 1 Johns. Ch. Rep. 46. *Sherwood v. Sutton*, 4 Mason's Rep. 143, 146. *Robinson v. Hook*, id. 139, 150, 152. *Piatt v. Vattier*, 9 Peters' Rep. 405. *Willison v. Watkins*, 3 Peters' Rep. 44. *Miller v. M'Intyre*, 6 Peters' Rep. 61, 66. 1 Fonbl. Eq. b. 1, ch. 4, § 27, and notes. *Brownell v. Brownell*, 2 Bro. Ch. Rep. 62.) Hence, in matters of account, although not barred by the statute of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, from the difficulty

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ceased, who, by his last will, appointed Isaac Gouverneur and Joseph Gouverneur his executors,) commenced an action of ejectment in the supreme court, to recover from the appellant a house and lot of ground in the city of New York.

After the cause was ready for trial, the appellant filed his bill in chancery, stating that in August, 1795, Gouverneur and Kemble, partners in trade, and pretending to be duly authorized by Joseph Gouverneur, (who was then absent beyond seas,) made a proposal in writing, and afterwards agreed with Robert Murray, partner of the house of Robert Murray & Co. for the sale of a house and lot to the said Robert Murray & Co. for the sum of 10,000 dollars, the one-half to be paid in January, 1796, and the remaining half in May, 1797. Immediate possession was to be given to Robert Murray; and on making the first payment, a deed was to be executed to the said Robert Murray & Co. who were to give a mortgage to secure the second payment. In pursuance *of this agreement, Robert Murray was put in possession of the premises, and continued in possession until he sold them to the appellant. The time of the first payment was postponed by mutual consent. In January, 1796, Gouverneur and Kemble, on their own account, purchased of Robert Murray & Co. bills of exchange on

of doing entire justice, when the original transactions have become obscure by time, and the evidence may be lost, and from the consciousness that the repose of titles and the security of property are mainly promoted by a full enforcement of the maxim, *Vigilantibus, non dormientibus, jura subveniunt*. (1 Fonbl. Eq. b. 1, ch. 4, § 27, and notes. Jeremy on Eq. Jurisd. b. 3, pt. 2, ch. 5, p. 549, 550. 1 Madd. Ch. Pr. 79, 80. *Holtcomb v. Rivers*, 1 Ch. Cas. 127.) Mr. Fonblanque's collection of principles and authorities to illustrate this doctrine is very comprehensive, and characterized by his usual acuteness and strong sense. 1 Fonbl. Eq. b. 1, ch. 4, § 27, and notes. Mr. Jeremy also upon this subject has given us a very ample and discriminating collection of authorities. Jeremy on Eq. Jurisd. b. 3, pt. 2, ch. 5, p. 549, 550.) Under peculiar circumstances, however, excusing or justifying the delay, courts of equity will not refuse their aid in furtherance of the rights of the party; since, in such cases, there is no pretence to insist upon laches or negligence, as a ground for dismissal of the suit. (*Lopdell v. Creagh*, 1 Bligh (N. S.) 255." Story's Eq. Jur. ed. 1846, vol. 1, § 529.)

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London to the amount of 25,000 dollars, and in paying for the same, deducted the first instalment of 5000 dollars due for the house and lot, and gave a receipt for the same, as the first instalment. Robert Murray did not then demand a conveyance for the house and lot, nor did Gouverneur and Kemble offer to give it.

On the 12th August, 1796, the appellant purchased of Robert Murray & Co. for 5000 dollars, all the right and interest in the said house and lot, and took possession thereof. He afterwards applied to Isaac Gouverneur and Joseph Gouverneur in October, 1796, for a fulfilment of the contract of sale, who made no answer to the application; but brought an action of ejectment against him, on which the appellant filed his bill in chancery, praying an injunction to stay the suit at law, and that the respondents should be decreed to execute to the appellants a good and sufficient deed for the premises, pursuant to the agreement.

Isaac Gouverneur, in his answer, stated, that he never pretended to have a power of attorney from Joseph Gouverneur, but had *directions* from him to sell the premises, in consequence of which he made the agreement with Robert Murray & Co. for the sale of the premises, and delivered the possession to Robert Murray, in 1795; that when the bills of exchange were purchased, the 5000 dollars deducted, was to be considered as on account of the purchase money for the premises, if the bills were duly paid; that the bills were accepted, but not paid, and that notice of the non-payment was given to Robert Murray & Co. and that he believed that Robert Murray & Co. had no effects in the hands *of the drawees, when the bills were drawn. Joseph [*440] Gouverneur stated, that he did not give Gouverneur and Kemble any letter of attorney to sell the house and lot, but merely directed them to sell the premises, as above stated.

The respondents, Gouverneur and Kemble, also stated, that they did not agree to accept the notes of Robert Murray & Co. for the first instalment; and that the deed for the house and lot was not to be given until the bills were paid,

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and the second instalment also paid, and that they did not agree to take a mortgage for the second payment.

Robert Murray & Co were in full credit in January, 1796, but some of their bills were protested in May following, and in July they stopped payment.

The appellant had expended, prior to the 12th August, 1796, 600 dollars in repairs on the house, and a further sum after that time.

After hearing the cause, the chancellor decreed, that the appellant should pay to the defendants 10,000 dollars, with interest, to be ascertained by a master, and on payment thereof, the respondents should execute a conveyance to the appellant for the premises in question, and that unless this was done in 20 days, the injunction should be dissolved. The master reported the interest to be 2345 dollars and 97 cents.

From this decree and order, the appellant entered an appeal to this court.

The cause was argued by *Harison* and *Burr*, for the appellant; and by *B. Livingston* and *Hoffman*, Attorney General, for the respondents.

KENT, J. I do not consider the bills which the respondents took in January, 1796, as a payment of the 5000 dollars; notwithstanding they gave a receipt, as for so much cash. Receipts are never so conclusive but that they [*441] may be explained; (a) and we have the "consideration of this receipt fully explained to us. The bills were drawn by Robert Murray & Co. on one of the partners in London. This is, in fact, like a person drawing a bill on himself; the law imposes on him all requisite notice.

It is a settled rule of law, that a bill shall not be a discharge of a precedent debt, unless it be so expressly agreed between the parties. (1 Salk. 124.) "The law is clear," says Lord Kenyon, (1 Esp. Cases, 8,) "that if, in payment of a debt, the creditor is content to take a bill or note, payable at a future day, he cannot legally commence an action

(a) See *supra*, vol. 1, p. 146, n. (a) to *Ensign v. Webster*.

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on the original debt, until such bill or note becomes payable or default is made ; but if such bill or note is of no value, as if, for example, it be drawn on a person who has no effects of the drawer in hand, (as was the case here,) and who, therefore, refuses it, in such case he may consider it as waste paper."(b)

(b) It is well settled as a general principle, that the transfer of a bill or note does not satisfy an existing debt, unless it be paid and accepted in good faith for that purpose. If, however, the bill or note be taken in satisfaction of the debt, or if it be received upon condition that it be collected, and the creditor is guilty of laches in the collection, it is regarded, in the former instance, as a payment, and in the latter, as an appropriation of the note, which is equivalent to a payment in its effect. (*Dayton v. Trull*, 23 Wend. 345. *Copper v. Powell*, Anthon's N. P. 49. *Tobey v. Barber*, 5 Johnson, 68. *Johnson v. Weed*, 9 id. 310. *Putnam v. Lewis*, 8 id. 359. *Hoan v. Clute*, 15 Johnson, 224. *Burdick v. Green*, id. 247. *Herring v. Sanger*, 3 Johnson's Cas. 71. *Woodcock v. Bennett*, 1 Cowen, 711. *Higgins v. Packard*, 2 Hall, 547. *Sheehy v. Mandeville*, 6 Cranch, 253. *Gallagher v. Roberts*, 2 Wash. C. C. 191 ; 1 id. 321 ; 1 id. 156. *Brown v. Jackson*, 2 id. 24 ; 1 id. 512. *Denniston v. Imbree*, 3 id. 396. *Parker v. United States*, Peters' C. C. 256. *Newell v. Hussey*, 6 Shepley, 249. *Comstock v. Smith*, 2 id. 202. See 4 Mumford, 487. Paine, 285. *Henry v. Donnaghy*, Addison, 39. *McGinn v. Holmes*, 2 Watts, 121. *Abercrombie v. Mosely*, 9 Porter, 145. *Dougal v. Coles*, 5 Day, 511. *Anderson v. Henshaw*, 2 id. 272. *Bill v. Porter*, 9 Conn. 23. *Coxe v. Hunkinson*, Coxe, 85. *Chastain v. Johnson*, 2 Bai. 574. *Kennell v. Hennesy*, Peck, 273. *McGuire v. Gadsby*, 3 Call, 234. *Slocumb v. Holmes*, 1 How. (Miss.) 139. *Cave v. Hall*, 5 Missouri, 59. *Pope v. Tunstall*, 2 Pike, 209. *Watson v. Owens*, 1 Richard. 111.) In Maine, however, the presumption is that a negotiable bill given in the state was designed to be an extinguishment of the original demand. This presumption, however, is disputable, and the rule does not apply to notes given in a foreign country. (*Descadillas v. Harris*, 8 Greenleaf, 298. *Varner v. Nobleborough*, 2 Greenl. 121. *Gilmour v. Bussey*, 3 Fairfield, 419. See *Wallace v. Agry*, 4 Mason, 343.) The same rule exists in Alabama, Massachusetts and Pennsylvania. (*Hutchins v. Olcott*, 4 Vermont, 555. *Plankenborn v. Cave*, 2 Yeates, 370. *Wood v. Bodwell*, 19 Pickering, 268. *Jones v. Kennedy*, 11 id. 125. *Reed v. Upton*, 10 id. 522. *Watkins v. Hill*, 8 id. 522. *Baker v. Briggs*, id. 122. *Van Cleef v. Therasson*, 3 id. 12. *Johnson v. Johnson*, 11 Massachusetts, 359. *Goodenow v. Taylor*, 7 id. 36. *Maneely v. McGee*, 6 id. 143. *Greenwood v. Curtis*, id. 358. *Thatcher v. Denamore*, 5 id. 299. *Emerson v. Prov. Hat Man Co.* 19 id. 237. *Butts v. Dean*, 2 Metcalf, 76. *Ilsley v. Jewett*, id. 168. *Maynard v. Johnson*, 4 Alabama, 116.) The case of *Terrey v. Baxter*, (13 Vermont, 452,) seems somewhat to conflict with the rule laid down in *Hutchins v. Olcott*, (cited *supra*,) in deciding that a promissory note of the debtor or of a

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It is evident, that Robert Murray did not consider the bills as payment ; for, as the appellant states, on the first payment Robert Murray was to receive a deed, and yet, after the delivery of the bills, and the receipt was given, he did not require a conveyance. This is pretty decisive proof, that Robert Murray himself did not regard the 5000 dollars as an absolute payment.

The appellant, if a *bona fide* purchaser without notice, (of which there may be some doubt,) took the house and lot, subject to all the equity between the parties, existing prior to the assignment; and, of course, he could not require a specific performance of the contract on other terms than those which Robert Murray could insist upon; and the latter could not, in equity, demand a conveyance, without tendering the 10,000 dollars, the consideration money for the sale.(c)

As to the sum expended by the appellant for repairs, it may be left for liquidation, in an action for the *mesne profits*, if the respondents should think proper to sue [*442] for the rents and profits. The action for *mesne profits* is a liberal and equitable action, and will allow of every kind of equitable defence.(d)

On the whole, I am of opinion, that the decree of the chancellor ought to be affirmed.

The rest of the court being of the same opinion, it was, thereupon, ORDERED, ADJUDGED and DECREED, that the decree of the Chancellor be affirmed.

Judgment of affirmance.

third person with the guaranty of the debtor prove unavailable to the creditor without any fault on his part, he may resort to his original demand.

(c) *Beaumont v. Thomas*, 1 Louis. An. Rep. 284. *Moulton v. Reese*, Wright, 381. *Salts v. Everett*, 20 Wendell, 267. *Bradeen v. Brooks*, 9 Shepley, 463.

(d) See Till. Adams on Ejectment, ed. 1846, 379, *et seq.* Roscoe on Actions Relative to Real Property, 705, *et seq.* Stephens' N. P. p. 1490, *et seq.* Archbold's N. P. 129, 405, *et seq.* And see Stats. 1 Geo. IV. ch. 87, § 2, and 2 Rev. Stat. of N. York, 3d ed. 406. See Acts 21st March, 1806, and 13th April, 1807. As to Scotch law, see Erskine, 62, tit. 1, § 25. Stair, b. 9, tit. 11, § 23.

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EDWARD GOOLD AND CHARLES D. GOOLD, *Plaintiffs in Error, against JOHN SHAW, Defendant in Error.*

THIS cause came before the court on a writ of error, from the supreme court. For the facts in the cause, and the reasons of the court below, see 1 Johns. Cas. p. 293, 309.

After argument, this court unanimously affirmed the judgment of the supreme court, with costs, and the record was ordered to be remitted.

Judgment affirmed.(a)

*THE UNITED INSURANCE COMPANY OF NEW [*443]
YORK, *Plaintiffs in Error, against ROBERT
LENOX, Defendant in Error.*

Where a ship is abandoned to the insurer who accepts the abandonment, and the voyage is afterwards performed, and freight earned, the insurer is entitled to the freight earned after the abandonment, or *pro rata*.

THIS cause came before the court, on a writ of error from the supreme court. See 1 Johns. Cases, p. 377, 390, where the facts and opinions delivered by the judges of the supreme court are stated.

Troup and Harison, for the plaintiffs in error, contended, that the judgment of the supreme court ought to be reversed :

1. Because freight being nothing more than the earnings of the ship, is to be regarded solely as an incident which is attached to the ship, as the principal. When, therefore, an abandonment of the ship is made and accepted, the freight, of course, passes with the ship to the underwriter ; in like manner as the grant of a tree vests the fruit of it in the gran-

(a) See *supra*, vol. 1, p. 293, n. (b.)

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tee. If a different principle were to prevail, the underwriter, by an abandonment, would acquire a qualified, instead of an absolute right to the property abandoned.

2. Because the contract of insurance, being a contract of indemnity, has it in view to place the assured in the situation he was in, at the commencement of the voyage; and not to yield him a profit. It naturally happens, that the ship becomes deteriorated in the course of her voyage; and the freight she earns is intended to compensate for such deterioration. But if the assured may abandon the ship, and at the same time retain the freight, he will, in many cases, convert what was designed as a mere indemnity, into a gainful speculation.

[*444] *3. Because, although the law permits freight to be insured, yet the underwriter thereon, in case of abandonment, cannot be entitled to more than the owner of the ship, who had made no insurance on freight, would have a right to receive; and if, in such case, the owner of the ship, upon principle, would have no right to freight, it must necessarily follow, that the claim for freight, on the part of the underwriter, cannot be supported.

4. Because, if the freight can be apportioned, as has been done in this cause, it would become the interest of the owner of the ship, (who had not insured his freight,) upon some pretext or other, to break up the voyage whenever it was nearly accomplished. Thus an extensive field would be opened for additional frauds upon underwriters, who are a class of men already too much exposed to the pernicious effects of fraud.

B. Livingston, for the defendant in error, contended, that the judgment of the supreme court was erroneous, because the plaintiffs were entitled to no part of the freight earned during the voyage insured, and therefore, the judgment should have been rendered for the defendant generally.

1. Vessels, goods and freight are distinct interests, and the most frequent objects of marine insurance. In case of abandonment, the respective underwriters acquire an interest in each, according to the subject matter of the different policies.

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The portion of property oftentimes saved, in case of total loss, technically so called, is a great encouragement to insurance ; but an insurer on freight would never, in cases of disaster, if the plaintiffs be right, have any thing to receive. This would turn a policy of freight into a very unequal, if not gambling contract on the part of the insurer. He must ever forego all benefit of salvage ; but if this were so, *premia* on freight would always be higher than on ships *or goods. This is not pretended to be the case. [*445] The rates on these different articles, in general, do not vary.

2. It is a mistake to consider freight as "nothing more than the earnings of a ship." The vessel, it is true, is one, and the principal *item* in the expense from which profit is ultimately expected ; but provisions, seamen's wages, &c. are also heavy charges. To indemnify merchants for these advances, in case of loss, and not for the cost of the vessel, is the principal object of an insurance on freight. The freight received by the owner will, in many cases, not be equal to these expenses, for which he is personally responsible, and which can in no way be thrown on an insurer of the ship. It will be no answer to say, that wages, which form one article of this expense, remain a *lien* on her, in the hands of the underwriters. If they do, there can be no doubt the owner would be compelled to refund ; for he must abandon the property free of encumbrance ; and were this otherwise, the vessel might sink the day after her arrival, and the mariners be left without recourse, but against the owner. As the underwriter on a vessel, therefore, contributes no part of the expense necessary to make freight, it is unreasonable in him to expect any part of it. "*Qui sentit commodum, sentire debet et onus.*" The plaintiffs have borne none of the burthen, and have, therefore, no title to any of the earnings, which may, after all, be very inadequate to cancel the debt of the owner.

3. In case of capture and an abandonment, the expenses of reclaiming the property are apportioned among the underwriters on the ship, the goods and the freight. But why

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make the underwriter on the latter pay any thing, if, the moment the vessel arrives, in case of release, the assurer on the ship is to pocket all her hire? He pays his portion of this expense, because the freight earned, and to be earned, on that voyage, is regarded, after abandonment, as his property, just as much as the goods belong to those who have insured them.

[*446] *4th. True it is, every policy is a contract of indemnity; at least, such was its original design: but it may and frequently is converted into an instrument of gain; we are willing here to regard it only as a mean of indemnity. This principle, properly understood, will entitle the defendant to a judgment. Freight is not an imaginary profit. It is a compensation received or expected for the use of the property. Thus a merchant, whose ship may have cost a large sum, lets her out for a voyage of two or three years, at a rate, which, after paying the expenses, will not, perhaps, yield more than lawful interest for the capital expended in building her. The ship is insured at her just value; the freight is uncovered. After being absent near the whole time, he hears of a detention or some other accident, which induces him to abandon. In a day or two the vessel arrives, and the whole freight becomes payable. How is the merchant indemnified for being so long out of his money, and for the heavy expenses of the voyage, unless he receives the freight? or under what pretence can the underwriter on the ship demand it? He has expended no capital; incurred no expense; nor been at any risk as to the freight. The subject he insured he receives, and ought to be satisfied with it. If the vessel had arrived in ballast, or by any means no freight had been made, he would hardly have reimbursed the owner, the large sums he had expended, in hope of a reasonable gain.

5th. On the plaintiff's system, an insurer on a vessel, must frequently be a great gainer. A policy on freight attaches as soon as the right of freight commences, that is, the moment the cargo is on board and the voyage begins. Suppose freight from New York to the East Indies is insured to

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the amount of 20,000 dollars ; the vessel is taken, the day after she sails, by a French privateer ; she is robbed of her cargo and sent back, with two or three hands, to New York ; the owner abandons the ship and freight to their respective underwriters ; the *vessel has received no [*447] damage, and will probably sell for the amount of the policy. This ought to content the underwriters on the vessel. Not so. They no sooner hear the owner has received 20,000 dollars from the underwriters, on freight, than they very civilly call on him to refund. Were the request a little more modest, a solitary precedent might be found in its favor. As none is produced, although the case must occur every day, we may fairly presume the sense of the mercantile world has ever been against so extraordinary and ill-founded a pretension.

6th. The plaintiffs have likened an abandonment of a ship to the grant of a tree. There is a difference in the cases. The former, when furnished, earns nothing of itself, or without great expense and labor, on the owner's part ; a tree once planted bears of itself ; if this expense and labor have been bestowed by the former proprietor, it is reasonable to give him the avails. A sale of a vessel at sea, would hardly pass the freight for the voyage she was then on, without containing a special stipulation to that effect, and an indemnity to the grantor against wages and other charges. The common understanding of such a sale is, that the ship and tackle only pass to the vendee, and that the freight belongs to the vendor, or former proprietor. But if the analogy between the fruit of a tree and the earnings of a ship, be complete, the former as well as the latter is an insurable interest. Suppose then the tree, or its trunk and limbs, to be insured against thieves, by one man, and the fruit by another ; just as the oranges are ripe, the tree is stolen and carried off, and an abandonment in due form is immediately made to both underwriters. The next day the booty is recovered from the captors, who are no other than some mischievous boys of the neighborhood. The oranges are plucked, but the detection takes place in time to secure every

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thing. How is this property to be divided. I am not certain there is any adjudged case in point, in [*448] *Emerigon, Pothier, Valin, Roccus, Bartholus, or Park; but it appears reasonable that the underwriter on the fruit should take all the oranges to himself; because, if they had been stolen, and the tree left, he alone must have made good the loss. We are willing the tree, with its body, bark, boughs, suckers and leaves, be disposed of for the benefit of the other underwriter.

7th. It is said that the owner, by an apportionment of the freight, has an inducement to break up the voyage; this supposes it to be in his power so to do, when he pleases. This is not correct; a fraud of this kind cannot be well committed without the privity of the master, and others, which would lead to detection. It is also supposing men to be more wicked than they really are. If we determine to guard against every imposition that may be practised on underwriters, we must put an end to all insurances. Abandonments open a wide door to frauds; so do high valuations; so do insurances on profits, on lives, on goods, on houses, &c. but this is no argument against them. Now and then a worthless member of society will pervert them to the purposes of fraud, while thousands are thereby honestly preserved from ruin. It is not in human foresight to form a general rule, which may not, in its application to particular cases, be abused; yet such rules must be adopted and adhered to. In doing this, in the case before us, we must respect the rights and pretensions of the different parties, and not do injustice to either, because frauds may be perpetrated by others.

Upon the whole, we insist, that an underwriter on the ship has no claim to any of the freight earned *during the particular voyage insured*; that on the termination of such voyage, the vessel alone, in case of abandonment, becomes his property; that an insurer on freight, or the owner, where no such insurance is made, is entitled to the whole of the freight which is earned during *such voyage*; that [*449] this necessarily results from the relative situation and the rights of the parties, and that a contrary

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doctrine will put an end to all insurance on freight. We therefore hope the judgment complained of will be reversed, and one rendered in favor of the defendant.

A majority of the court being of opinion that the plaintiff was entitled only to the freight earned subsequent to the peril incurred which caused the abandonment, or *pro rata*, it was thereupon ORDERED, ADJUDGED and DECREED, that the judgment of the supreme court be affirmed, with costs, and the record remitted, &c.

Judgment of affirmance.(a)(b)

(a) See *supra*, vol. 1, p. 377, n. (b.)

(b) [Old note.] See *Davy v. Hallett*, 3 Caines, 16-22, and 251. *Mumford v. Hallett*, 1 Johns. Rep. 433. *Livingston v. Columbian Ins. Co.* 3 Johns. Rep. 49. And see *Thompson v. Rowcroft*, 4 East's Rep. 34. *Latham v. Terry*, 3 Bos. & Pull. 479. *McCarthy v. Abel*, 5 East's Rep. 388. *Sharp v. Gladstone*, 7 East, 24. *Ker v. Osborne*, 9 East, 378. Park on Ins. 227-236, 6th ed. Marshall, 2d ed. 604-608. The question in the English courts, as to whom the *freight*, earned subsequent to an abandonment of the ship, belongs, in case of a separate insurance on *freight*, appears, from the above authorities, to remain still undecided. In this state, though the supreme court, in the case of *Livingston v. The United Ins. Co.* (3 Johns. Rep. 49,) definitively settled, that the insured might abandon the ship to one insurer and the freight to another, on separate policies, and recover the amount from each, in case of a total loss; yet they declined deciding the question between the two sets of insurers, to which of them the freight subsequently earned belonged. But *Livingston, J.* in 1 Caines, 578, and 3 Caines, 251, in giving his opinion, seemed to suppose it settled by the case of *The United Ins. Co. v. Lenox*, that the underwriters on the *ship*, were entitled to the *freight* earned after the abandonment, during the voyage insured.

CASES
ADJUDGED IN THE
COURT FOR THE CORRECTION OF ERRORS
IN THE
STATE OF NEW YORK,
IN FEBRUARY, 1802.

JOHN C. VANDENHEUVEL, *Plaintiff in Error, against*
THE UNITED INSURANCE COMPANY, *Defendants in*
***Error.*(a)**

In an action on a policy of insurance, the sentence of a foreign court of admiralty is not conclusive evidence as to the character of the property, and a breach of the warranty of neutrality.(b)

THIS cause came before the court on a writ of error from the supreme court. For the facts in the case, and the opinion of the court below, see *ante*, pp. 127—168.

VAN VECHTEN, Senator. Two questions are presented for our consideration :

1. Whether the description of the ship in the policy, as being American, and the plaintiff's representation of her being his property, amount, in judgment of law, to a warranty of her neutrality ? if so, then,

2. Whether the warranty is conclusively fulfilled by her condemnation, as enemy's property ?

(a) S. C. 2 Caines' Cas. in Error, 217.

(b) See *supra*, p. 144, n. (b.) Story's Conflict of Laws, ed. 1846, § 593, and references.

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In examining these questions I have sought, with solicitude, to ascertain what the law is, and candor constrains me to declare, not without a leaning against the result [*452] which my investigation has produced. But, as *we are called upon to pronounce the law as we find it, I hold it to be my duty to deliver that result, referring it to the proper authority to alter the law, if an alteration shall be deemed necessary.

1. I take the rule to be well settled, that all contracts of insurance must be founded on truth, and a fair disclosure of every fact which is material to the risk to be run. When, therefore, an inhabitant of a neutral nation requires insurance to be made in time of war, on a ship which he states to be of the same nation; the natural inference is, that the property he wishes to have insured is neutral. But when he goes still farther, and assents to insert in the policy such a description of the vessel, as is strictly applicable to a neutral ship only, it must be deemed equivalent to a warranty of her neutrality; and the reasonable interpretation of the contract is, that it was so intended by the parties. What else can be the object of the description? Or, what other use can be ascribed to it? Surely the court cannot intend that its insertion was without a meaning.

In the case before us, the ship is described as *the good American ship, the Astrea*, and represented to be the property of a citizen of New York, where all the parties reside. What is the language of this transaction? The plaintiff requests insurance on a ship; the defendants inquire, what ship? He answers, an American ship, the Astrea. Again, the defendants ask, whose property is she? To which the plaintiff replies, mine. From such a statement of facts, what other reasonable inference can be deduced, than that the plaintiff meant it to be understood by the defendants, that the ship in question was American, and the property of an American citizen; and consequently neutral? (See *Goiz v. Low*, 1 Johns. Cases, 341.)

If this exposition of the contract is correct, it follows, that

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on the neutrality of the ship depends the validity of the policy.

*2. From an attentive examination of the authorities relative to the efficacy of the judgments of foreign courts of competent jurisdiction, I have no doubt that they are conclusive evidence of the facts upon which they are found. If it be not so, this absurdity will result; the courts of one nation may have jurisdiction of certain causes, may try and determine them, and without reversing those determinations, the courts of another nation may try the same causes over again, and give contrary decisions; and thus, there would be contradictory determinations in force upon the same subjects, and at the same time, by courts of equal authority.

The distinction which is contended for by the opposers of this doctrine, that the sentence of a foreign court of admiralty is conclusive to change the property that may be sold under it, but not to bind those whose warranty of the property is expressly falsified by the sentence, is to me very unsatisfactory. Either the court has full power to decide the point on which the condemnation rests, or it has not. If it has the power, its decision must be conclusive as to the whole subject. If it has not, the decision is of no force. The validity of the sale of the property of an American citizen under an admiralty condemnation, turns upon the authority of the court to fix, by its sentence, the character of that property, in relation to the parties at war; and if such authority is vested in the foreign court, with respect to one party interested in the property, I perceive no solid reasons why it should not extend to all the parties.

Besides, both the insurers and insured must be presumed, when they entered into this contract, to have contemplated the risk of capture at sea, and consequently of an admiralty trial abroad, on the point of neutrality of the property insured; for in that view alone was the warranty of neutrality material. It is, therefore, fairly inferable, that the contracting parties meant to refer the fact of neutrality to the courts of the belligerents, where *the question of [*454]

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prize or not, was alone triable, in case of capture. The assured not only stipulates that the property is neutral, but the spirit of his stipulation is, that he will maintain it to be so when examined before the foreign tribunal. (8 Term Rep. 244, 444. Millar, 466.) He is, therefore an essential party to the proceeding in that court, and must be considered as having assumed the risk of its decision on the point of neutrality. To exonerate him from the consequences of that risk, at the expense of the underwriter, would, in my opinion, not only be unjust, but repugnant to the sound interpretation of the policy.

In forming my opinion, I have dismissed all considerations of public policy. 1. Because I deem them to be inadmissible in a court of justice, when called upon to pronounce the existing law of the land. 2. Because the question before us is simply, which of our own citizens shall bear the loss of property condemned for want of neutrality; the party who guarantied its neutrality, or those to whom the guaranty was made? On the latter point, who can hesitate to say, that this court ought not to lend its aid to relieve a man from the consequences of his own warranty, to the prejudice of those for whose protection that warranty was contrived?

Thus far I have proceeded on the true intent of the parties, as manifested by their contract; I now pass on to what appears to me to be the settled law on this subject.

In England, the conclusiveness of the sentence of foreign courts of competent jurisdiction, has been long since admitted, and confirmed, by a uniform train of decisions, in her highest courts of judicature. The obligatory force of many of those decisions upon us, is not now to be controverted, because it is established by the constitution which has adopted them as part of the common law.

[*455] *The sentences of admiralty courts appear to me to be of the number which are placed on that footing. Indeed the doctrine of conclusiveness applies, with peculiar force, to their sentences relative to prize, because their authority is bottomed on the general law of nations, which gives the right of capturing enemy's property on the

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high seas, to belligerents. (Collect. Jurid. 101, 102, 106. Grotius, lib. 3, c. 2, s. 5. Vattel, lib. 2, s. 84, 85. Martens, 104, 105. 2 Ersk. Inst. 735.) This right necessarily involves the right of instituting courts, particularly adapted to try the legality of such captures. And hence it is, that we find courts of this description existing in all maritime nations, and embracing every where the same objects. They form a separate and independent branch of jurisprudence, uncontrolled by a common superior. Their mode of proceeding is appropriate, and variant from that of the common law courts. Hence it results, that the latter have neither the power to ascertain the merits of their sentences, nor of reviewing them.

An objection has been made, and was urged with considerable zeal, on the argument, that no direct authority on this point, is to be found in the English judicial proceedings, prior to our revolution. But on recurring to the English reporters and elementary writers, I find that objection is unfounded.

In 1681, in the cause of *Newland v. Horseman*, (1 Vernon, 21,) Lord Chancellor Nottingham declares himself explicitly in favor of the conclusiveness of foreign admiralty sentences.

In the case of *Hughes v. Cornelius*, in the reign of Charles II. the judges of the King's Bench laid down the rule in unqualified terms, that they were bound to notice the sentences of courts of admiralty abroad, and must not set them at large. (2 Shower, 242.)

In the tenth year of the reign of William III. Lord Holt, in an action on a policy of insurance, held, that if it appear upon the evidence, that the ship insured was seized and condemned by process of law, by the sentence *the property and ownership are destroyed, and [*456] there is no remedy on the policy. (1 Lord Raym. 724.)

The case from the Theory of Evidence, in 1761, bears directly upon the present question, and establishes the conclusiveness of a French admiralty sentence on the war-

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ranty of neutrality, in a policy of insurance. (Theory of Ev. 37.)

The authority of the last case is fully confirmed by Judge Buller. (Buller's N. P. 243.) And I cannot discern whence it has been inferred, that he referred to the case of *Hughes and Cornelius*, for that was an action of trover, for an English ship, and the case he states is of a policy of insurance on a Swedish ship.

In the case of *Fernandes v. Decosta*, (Park on Ins. 178,) during the last French war, Lord Mansfield, in a similar case, adopts the same rule.

From those authorities, as well as the general course of decisions in the English courts, (Harg. 452, 457, 467, 471, 477, 479; 4 Co. 29; 7 Co. Litt. 3; 2 Lev. 14; 1 Freem. 83; Carth. 225; Amb. 761; 1 Salk. 290; 2 Bl. Rep. 977, 1175; 1 Show. 6; 1 Ld. Raym. 724; 2 Ld. Raym. 893; 2 Woodd. 456,) relative to domestic judgments, and the rules universally laid down by the most approved elementary writers, it appears incontrovertibly, that the conclusiveness of foreign admiralty sentences was received as settled law in England, before our revolution; and being so, we are required by no less authority than the constitution of this state, to pronounce it to be the law here.

It may, perhaps, be asked, whether there is no remedy for our citizens against the unjust decisions of foreign vice-admiralty courts? To such an inquiry, I would answer in the affirmative; for they have the same remedy against those sentences which foreigners have against the erroneous or unjust judgments of our own inferior courts; an appeal to the higher tribunals, which are clothed with legal power to review, annul, and set them right. And this I take to be the true course which public policy and the general law of nations prescribe.

[*457] *Upon the whole, therefore, I conclude, 1. According to the sound construction of the policy, it was founded on a warranty of neutrality of the property insured. 2. That that warranty is conclusively falsified, by

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the admiralty sentence of condemnation as enemy's property.

The result is, in my opinion, that the judgment of the supreme court ought to be affirmed.

CLINTON, Senator. The plaintiff having warranted a ship and cargo as American property, the question is, whether, in an action against the insurers, the sentence of a foreign court of admiralty, that a warranty was false, is conclusive evidence. It is admitted by the plaintiff, that the sentence binds and changes the property, and that it is *prima facie* evidence of the fact set up against him; and on the other hand, it is conceded by the defendants, that in several cases, in an action of this kind, the judgment is not definitive in favor of the insurers; such as when, on the face of it, it is founded on local ordinances, or contrary to the law of nations, or so ambiguous that the court cannot, from the reasons assigned, collect the grounds of it; and, that this case not coming within either of these descriptions, the contest between the parties still remains open, whether the foreign sentence be *prima facie* or conclusive evidence, against the insured, and whether it bind the property adjudicated only, or is conclusive to every extent and in every modification of the subject.

Upon a question of such immense importance, either as it respects the interests of commerce, the honor of the nation, the rights of individuals, or the principles of justice, great and mature deliberation is requisite and essential. I know not any cause that has ever been discussed in this court which embraces so many objects, to render the final result important. Attempts have been made to establish the doctrine of conclusiveness; and, as far as I can comprehend them, they may be arranged under four general heads.

*1st. Authorities previous to the 19th of April, [*458] 1775.

2d. Analogical reasoning from domestic courts.

3d. The nature and meaning of the contract of insurance; and,

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4th. National considerations of courtesy, comity, and the like.

The cases cited, as existing anterior to the revolution, are not only few, but are either ambiguous or not in point.

The most ancient one, reported in 2 Shower, of *Hughes v. Cornelius*, was an action of trover brought for a ship sold under a decree of a French admiralty court. The court admitted the sentence to be true, although contrary to the special verdict. They went upon the ground of the decree's changing the property, and of the inconveniences that would result to merchants, if the court should unravel the title of property acquired in this way; and the reason assigned by Chief Justice M'Kean, in a case reported in Dallas, (*Vasse v. Ball*, 2 Dallas, 271; see also 2 Dallas, 195,) seems to be conclusive. The idea that a sentence of a court of admiralty is conclusive, arises from the consideration that the court always proceeds *in rem*. The decree naturally and necessarily binds the subject of the proceeding. A ship or cargo, or any person purchasing under the decree, will, of course, be secure.

The next case relied upon, is a supposed one of a Swedish ship. It was first mentioned by an anonymous author, in a book entitled "Theory of Evidence." It does not appear in any collection of reports; and Buller, in referring to his authority for this, mentions the case in Shower. It, therefore, appears that it is confounded with the case of the Dutch ship in that author.

The case of *Fernandes* and *De Costa* was a *Nisi Prius* one, and it expressly states, that the plaintiff only gave a partial evidence of the vessel's being Portuguese; and all we can collect from it is, that the testimony adduced by him [*459] was not sufficient to balance that derived from the foreign adjudication. Will it be believed, that upon this slender ground, the mighty fabric of conclusiveness is attempted to be erected? For, independent of decisions since the revolution, which are no authority; of arguments from analogy, which I shall presently notice; and of a few scattered *dicta* in the books, which do not bear the stamp of

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judicial authority, there is nothing whereby to warrant the decision of the court below.

The arguments derived from the deference which is paid by the courts of England to each other's proceedings, do not apply. They are parts of the same building, held together by one common arch. They are under the same government, proceed according to the same law, and redress can be obtained through higher tribunals. If they attempt to exceed their jurisdiction, they can be restrained by a superior power which has an interest in preventing any undue encroachments, and repressing any improper deviations. This is not the case with a foreign court of admiralty. If a neutral conceives himself injured, and is indulged with an appeal, he must still continue in the court of the belligerent; and there is not any uniform law by which these courts govern themselves. They listen more to instructions from the sovereign, than to the injunctions of the law of nations. Lord Mansfield admits, that "in every war, the belligerent powers make particular regulations for themselves; and that no nation is obliged to be bound by them." (Park, 360.) It is conceded by the defendants, that a foreign sentence is binding if resting, on the face of it, on such regulations, and yet they declare, that if founded on these, but it does not appear to be so founded, that then it is conclusive.

With respect to the nature of the contract, upon which much has been said, I confess I do not perceive the force of the reasoning, which attempts to fix the loss on the insured.

"The contract of insurance, says Park, being for [*460] the benefit of the insured, and the advancement of trade, must be construed liberally, for the attainment of those ends. We must, therefore, not give it an exposition that would tend to embarrass commerce, or injure the assured; but adopt such a construction as will most promote the important objects in view. How commerce would be affected, shall hereafter be considered. By the terms of the contract, the assured warrants the property to be neutral, and it is understood to be incumbent on him, so to conduct the vessel,

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as not to forfeit her neutrality. If the vessel be neutral, in fact, he fulfils his warranty. He does not warrant that she shall be so in the conception of foreign courts. It is not in the reach of human sagacity, to scan the views which different men may take of the same subject, or the various motives which may produce clashing decisions. Against corruption or ignorance in judges, perjury in witnesses, and fraud in captors, it is out of the power of the assured to guard; they are risks which he casts upon the assurer, and which the assurer undertakes in consideration of an adequate premium. All the assured is required to do, is not to falsify his warranty. In this case he paid a war premium of 15 per cent; and, the foreign sentence out of view, the special verdict has verified his warranty.

With regard to the comity due from one national tribunal to another, it appears to me, that the compliment is carried sufficiently far, by considering the sentence as *prima facie* evidence. We are not bound to sacrifice the substantial interest of our citizens to etiquette or courtesy. If a foreign nation will countenance unjust spoliation, if a foreign judge will divide the spoil with the plunderer, are we to countenance the knave and the robber, and declare, with all possible politeness, "although we are convinced that an inquiry would paint you in these colors, yet, our respect for your authority, will prevail over a regard for justice, or [*461] the claims of our *citizens; we shall silence all discussion; and, although we know you both ignorant and corrupt, both oppressive and fraudulent, yet, as you wear the form, without attending to the obligations of a court of justice, we shall treat your decisions with all imaginable courtesy, comity, deference, politeness, and respect."

This is a summary of the doctrine, stripped of the imposing garb which it has assumed, and it can only be a question, whether it is most deserving of ridicule, or detestation.

In suits brought in England, upon foreign judgments, between the same parties, the courts consider them only as

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prima facie evidence of the demand, and admit the defendant, on a plea of *nil debet*, to contest the merits of the original cause of action. If a foreign judgment be not considered conclusive between the same parties, in cases of this nature, why should the sentence of a foreign court of admiralty between third persons? The constitution of the United States provides, that "full faith and credit shall be given in each state, to the public acts, records, and judicial proceedings, of every other state." And the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. Is it conceivable, that if the sentence of courts of disconnected nations are to be held in such high veneration, by each other, that the framers of the constitution could have thought it necessary to make this provision for sister states, in the closest bond of political connection.

The British have made the interests of commerce a primary object of their cares. In the discovery and arrangement of wise plans, and the execution of efficacious measures, for the attainment of this important end, they stand unrivalled in the history of mankind. Their fleets now traverse every clime, and visit every sea, laden with the riches of the world; they bear in their hands the trident of the ocean. In the time of war, they enrich themselves with the plunder of neutrals; *their courts appear [*462] every where, and condemnations are conducted, not according to the law of nations, or the rights of parties, but according to the instructions from the sovereign and the rapacity of the captors. "Much less," says Wooddeson, (2 Wooddes. 456,) "ought any of our courts to slight a foreign sentence. Unless we give credit to their proceedings, we cannot expect the judgments here should be thought to merit from them any reverence or attention." Here, then, is an explicit avowal that the doctrine is adopted with a view to a return. But France, having a different policy, has adopted a different system. (Emerigon, 457, 464.) It is to be further considered, that Great Britain is more than one-half her time at war; that she is an underwriting nation, and,

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therefore, highly interested in maintaining the rule laid down. Our policy is entirely different. Peace is no less our interest than our duty. Our courts are not liable to executive instructions, and, consequently, must be governed by the principles of justice ; not according to the exigencies of the state. In establishing, therefore, a rule for our government on this momentous subject, *argumenta ab inconvenienti* ought to have great weight. France and England have set us an example ; and, as the law of nations is at least doubtful, we are at liberty to adopt such a construction as shall most subserve the solid interests of this growing country. We ought also to consider, that the object of insurance is indemnity ; that instead of fixing the loss upon one, it divides it among many ; that with a pacific nation like ours, a construction that will release the insurer from war risks, will be a deprivation of all the benefits that can arise from a neutral position, and will expose us to most of the calamities, without any advantages, derivable from a belligerent state.

Even Great Britain, situated as she is, has found inconvenience, in many respects, from the generality of the rule she has adopted. Her courts have, by recent decisions, attempted to narrow it into smaller compass. Several important exceptions have been sanctioned, and *when-
[*463] ever a different course of policy shall be deemed advisable, the whole system will be destroyed. Our court has, unadvisedly, and in the first instance, without hearing argument, taken that direction ; and, with the best intentions, has persevered in a doctrine which would inevitably lead to the spoliation of our citizens, and the destruction of our commerce.

There is nothing, either in the constitution of the admiralty courts of European nations or the mode of proceeding in them, which entitle them to respect. They adopt the rules of the civil law. The judges hold their offices during pleasure, and follow the instructions of the ministry. The captors, who are interested, are admitted as witnesses, and the judges are paid in proportion to the condemnation.

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They are generally composed of needy adventurers ; their great aim is plunder, and their primary incentive, avarice.

I have thus, in a cursory manner, glanced at the principal grounds of reasoning in the cause, and I must own, that I feel most deeply impressed with its importance. The effects of the decision of this day, will be felt when we are no more ; and I trust that it will receive the approving voice of our consciences, and of our country.

GOLD, Senator. The questions that arise in this cause for the consideration of the court, are :

1st. Does the warranty in the terms of the *good American ship, the Astrea*, import, in judgment of law, *American or neutral property* ?

2d. Is the sentence of the vice-admiralty of Gibraltar *conclusive, and does it repel the verification of warranty here* ?

On the first preliminary question, however loose and indefinite men are in conversation upon subjects of this nature, yet when the *occasion* is considered, the bearing of the *property of the ship* on the professed object *of [*464] the contract ; its materiality to the risk, and consequent propriety of an understanding on the point, the court must, I apprehend, consider Mr. Vandenheuvel as explaining himself on the question of property, and under the terms *American ship*, warranting it *neutral*.

Such, in my apprehension, is the plain, fair and rational import of the language, used by the assured on this occasion.

On the second question in the cause, involving the legal effect of the sentences of foreign courts of admiralty, I enter with much diffidence, and all the solicitude which its extensive operation upon the fortunes of our fellow citizens, and the jurisprudence of our country inspires. If our law is settled on this point ; if the question is bound by authority, then the law must have its course, however unpleasant the consequences, however opposed to the speculations of the most enlightened statesmen.

For authority on the question, adjudged cases in that

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country from whence our jurisprudence is derived, antecedently to our revolution, must be resorted to.

The necessary effect of the sentences of foreign courts of admiralty, *in rem*, in changing the property in the subject matter, in case of condemnation, is readily evinced, both in point of reason and authority. To this the case of *Hughes v. Cornelius*, (2 Shower, 232,) strengthened by some other cases, bears strong testimony; in this the jurisdiction of all courts of admiralty, and the peace of all civilized nations, are essentially concerned.

But the reason for extending those sentences beyond the attainment of the above objects, to control the stipulations of parties in a policy of insurance, are not equally cogent; the necessity not equally apparent.

For authority to support this application of admiralty sentences are cited, Buller's N. P. 244; Theory of Evidence, 37; and the case of *Fernandes v. De Costa*, (Park, 177.) In the two first books, the rule to the above extent is laid down in nearly the same words; in plain and unequivocal [*465] terms; but no case is cited in the Theory of Evidence in support of the doctrine, and in Buller, the case relied on is that of *Hughes v. Cornelius*; which, although containing observations of the court of a very general and unqualified nature, yet, in the point adjudged, does not warrant the rule as there laid down.

The case of *Fernandes v. De Costa*, is apposite to the question before the court, and merits all that respect which is due to a N. P. decision of one of the greatest judges that ever sat in Westminster Hall. The name of Judge Buller must be considered also as adding some authority to the rule by him laid down, though supported by no adjudged case there cited.

No adjudications at bar, no elaborate discussions appear to have taken place on the question. On this foundation, in point of authority, stands the doctrine contended for by the defendants in error; and we are now called upon to say, whether the question is so bound down by authority as

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to be deemed at rest, and to repel a consideration of its merits.

After much reflection on the point, in every view I have been able to place it, I am not satisfied that the law on the subject was settled at the period of our revolution. In pursuing the history of law principles, in retracing adjudications, and collecting cases upon questions long agitated in courts, we find early cases often overruled; first opinions disregarded and reversed, and important questions finally settled in opposition to greater authority of precedent than what is to be found on the question before the court.

Such is the result presented by a perusal of English reporters.

But general principles are resorted to in support of the definitive effect of admiralty sentences, and domestic judgments are adduced for illustration.

In the principles of sovereignty, in the superior integrity and responsibility of domestic judges, their exemption from the influence of policy, from the dominion of "passions hostile to the administration of justice, too [*466] often excited in belligerent nations, in the prevalence of the salutary maxim of municipal origin, "*ut sit finis litium*," will be found reasons, I apprehend, for superior confidence in domestic tribunals.

The case of *Walker v. Witter*, (Doug. 5,) is strong to show the difference between domestic and foreign judgments; the incontrollable verity predicated of the former, is withheld from the latter, which are there holden to be *examinable*. Nor is the effect of this authority repelled by the argument, that a court resorted to, to carry into effect a foreign judgment, ought to be satisfied of its justice; the application is for *justice*, and not *favor*, and the court thus resorted to is bound by constitutional principles, not to delay that justice; besides, the same principle will apply to the case before the court.

The case of *Gage v. Bulkley*, in *Ridgway*, and *Burrows v. Jemino*, in *Strange*, are not considered as bearing on the question; they rested on a different principle, that of the

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"lex loci contractus." The qualified manner in which admiralty sentences are now received in England; their different operations as to the *fact* and the *law*, serve to mark a wide distinction between those sentences and domestic judgments.

If the reasons assigned for an admiralty decision do not, when tested by the law of nations, bear out the conclusion, the sentence is rejected; if the reasons are assigned in an obscure and unintelligible manner, as to the *point decided*, the result is the same; but if the judge should have no reasons, or, by casualty, omit to put them on the record, then the sentence becomes conclusive, and repels all examination.

Why a sentence founded on *error as to facts*, should be more conclusive than one founded on *error in law*, is difficult to conceive. That the mode of admiralty trial is more favorable to the investigation of truth than that provided by our common law, is not, I apprehend, [*467] *evinced by experience, nor do the opinions of some very eminent writers warrant any such conclusion.

To sentences standing on such grounds, my mind is not yet reconciled to yield that controlling effect now contended for. Nothing short of the law being made out in the clearest and most satisfactory manner, can, in my apprehension, justify the reception of those sentences, upon the broad ground now urged upon the court.

There is another ground remaining to be considered, on which it is with some difficulty I have been able to form an opinion.

The position of the insurer is, *that the insured, on entering into the policy, well knows the tribunal of the captors to be the prize-forum*; that a consideration of neutrality is essential to the determination; and, therefore, by the terms of his contract, assents to this test of his warranty. If the law, giving a conclusive effect to admiralty sentences, is to be deemed settled, then would the above conclusion correctly follow; then would the assured be presumed to know *that*

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law, and to assent by his contract to all its consequences; but, upon any other ground, he may with equal reason be presumed to assent to a limited operation of these sentences, as *prima facie*, or presumptive evidence, reserving to himself a right, and taking upon himself the burthen of disproving the same, and verifying his warranty. Such must be the conclusion of the assured in France.

A mind conscious of the truth of the representation in the policy, would with difficulty be carried to the conclusion, that although the property insured be, in fact, neutral, yet, if condemned it must therefore be deemed enemy's. Where the property, in fact, is neutral, and in such case only, will the above opinion operate; it is not to be presumed, that the assured calculates on the event of a condemnation. In the various cases of loss by any of the perils insured against, the falsification of the warranty, is equally fatal to a recovery by the assured, *though no foreign admiralty [*468] may have passed upon the question.

Such are the grounds on which my opinion on this important question is formed. I will only add, that it is with no small diffidence I submit an opinion for the reversal of the judgment of a court, possessing, in so eminent a degree, the high respect and confidence of the community.

The majority of the court being of the same opinion, it was thereupon ORDERED and ADJUDGED, that the plaintiff in error recover, as for a total loss, the amount found by the jury in the special verdict, with interest and costs, and that the judgment of the supreme court be reversed, and the record remitted, &c.

Judgment of reversal.(a)(b)

(a) [Old note.] Since the decision of the above cause, several cases have arisen in the courts of Great Britain and the United States, in which the question as to the effect and conclusiveness of the sentences of foreign courts of admiralty, has been variously considered and determined. (See Marshall on Insurance, 2d ed. p. 430, 436. Park on Insurance, 6th ed. p. 463, 497. And see *Geyers v. Aguilar*, 7 Term Rep. 681. *Christie v. Secretan*, 8 Term

(b) See *supra*, vol. 1, p. 16, n. (a), and vol. 2, p. 16, n. (b); 144, n. (b)

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[*469] *ANDREW VOS AND JOHN B. GRAVES, *Plaintiffs in Error, against THE UNITED INSURANCE COMPANY, Defendants in Error.*(a)

Sailing for a port understood to be blockaded is not a breach of neutrality, so as to affect the warranty in a policy of insurance.

THIS cause came before the court on a writ of error from the supreme court. For the facts in the cause, and the opinion of the court, see *ante*, pp. 180—191.

Rep. 192. *Garrells v. Kensington*, 8 Term Rep. 230. *Pollard v. Bell*, 8 Term Rep. 441. *Bird v. Appleton*, 8 Term Rep. 562. *Price v. Bell*, 1 East's Rep. 663. *Oddy v. Bovil*, 2 East's Rep. 473. *Baring v. Claggett*, 3 Bos. & Pull. 201. *Lothian v. Henderson*, 3 Bos. & Pull. 499. *Rolton v. Gladstone*, 5 East, 155. *Baring v. Christie*, 5 East, 398. *Baring v. Royal Ex. Ass.* 5 East, 99. *Fisher v. Ogle*, 1 Camp. N. P. Cases, 418. *Donaldson v. Thompson*, 1 Campb. N. P. Cases, 429. *Kinderley and others v. Chace and others*, in Park, 486, and Marshall, 423.)

The result of the decisions in the English courts seems to be that where property is warranted neutral, and the court of the belligerent country condemns it as belonging to an enemy, the sentence, however absurd, is conclusive evidence that the warranty is false; but where the belligerent country condemns as prize, without adverting to the question of neutrality at all, it does not operate on the truth or falsehood of the warranty, or a fact asserted in the policy of insurance.

How reluctantly this doctrine, as to the conclusiveness of foreign sentences, has been acquiesced in by some of the judges of the English courts, may be seen from the expressions of Lord Ellenborough, in the cases of *Fisher v. Ogle* and *Donaldson v. Thompson*, where he says, "it is by an overstrained comity, that these sentences are received as conclusive evidence of the facts which they positively aver, and upon which they specifically profess to be founded.

"I am by no means disposed to extend the comity, which has been showed to these sentences of foreign admiralty courts. I shall die, like Lord Thurlow, in the belief that they ought never to have been admitted. The doctrine in their favor rests upon an authority in Shower, (vol. 2, p. 233, *Hughes v. Cornelius*;) which does not fully support it, and the practice of receiving them, often leads, in its consequences, to the greatest injustice." In a *gazette* report of the case of *Donaldson v. Thompson*, Lord Ellenborough is sta-

(a) S. C. 1 *Caines' Cas. in Error*, vii.

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*VAN VECHTEN, Senator. Two questions present [*470] themselves to my mind, as material for our consideration in the present case.

ted to have said, "that he should always hold the authorities of foreign courts to condemn ships as prize, to the utmost strictness of proof, when offered as evidence to affect the rights of third parties, in a court of justice of this country: that there were some of the most enlightened minds in the country, who thought that these sentences of foreign courts ought never to be received in evidence at all on such occasions; that Lord Thurlow never met him without saying so: his mind was full upon it; he said it was an *anomaly* in the law, and ought never to have been allowed to have crept into it; and that he agreed with Lord Thurlow upon that subject, and he should die in the faith; but the usage of nations, perhaps, required, certainly authority had decided, that these sentences should be received in evidence, and be conclusive on all things on which they operated; a doctrine, to give way to which, was sufficiently painful in many instances, but he should never consent to extend it an *iota* beyond the letter."

In *Vasse v. Ball*, (2 Dall. 270,) decided in the supreme court of Pennsylvania, in 1797, where the property was warranted neutral, and the libel stated several grounds of forfeiture, and the sentence of condemnation was general, without specifying any particular cause of forfeiture, the court held that the assured, notwithstanding the sentence, might show that the property was American.

In the case of *Dempsey, Assignee of Brown, v. The Insurance Company of Pennsylvania*, decided in the high court of errors and appeals, in the state of Pennsylvania, (in 1808,) it was held, after two arguments, that "the sentence of a foreign court of admiralty was conclusive, not only as to its direct effects, but also as to the facts directly decided by it;" Judges Rush, Roberts, Hamilton, Young and Wilson, in the affirmative; Judge Cooper, contra. (1 Binn. Rep. 299, n.) See also *Colhoun v. Ins. Co. of Pennsylvania*, 1 Binn. Rep. 293, and *Galbraith v. Gracie*, in the circuit court of the United States, 1 Binn. Rep. 293, note.

The legislature of Pennsylvania, by an act of the 29th of March, 1809, declared that no sentence of any (foreign) court, having or exercising jurisdiction of prize, shall be conclusive evidence in any case, of any fact, matter or thing, therein contained, except of the acts of such court; provided, that nothing in the act shall be construed to impair or destroy the legal effects of such sentence on the property affected, or intended to be affected thereby, &c.

In the case of *Reese v. Himely*, (4 Cranch's Rep. 241,) the supreme court of the United States decided; that a sentence of condemnation, by a competent court, having jurisdiction over the subject matter of its judgment, is conclusive as to the title of the thing claimed under it. Chace, J. and Livingston, J. dissenting. And in *Croudeon and others v. Leonard*, (4 Cranch, 434,) which was an action on a policy of insurance, the supreme court of the

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1. Whether the master of the plaintiffs' vessel has made such an attempt to break a blockade, as to forfeit their neutral rights? and,

2. Whether, admitting that he has not incurred such a forfeiture, the defendants are, under all the circumstances of this case, liable for any risk incurred beyond the voyage to Hamburg?

With respect to the first question, it appears to be the undisputed law of nations, that a breach of blockade works a forfeiture of vessel and cargo.

The precise point in the present case is, whether there was a breach of the blockade.

[*471] "There is no room for doubt, that the vessel sailed from Gruxhaven with an intent to enter Amsterdam; and it seems to be conceded on all sides, that the master knew of the investment of that port when he set out. The intent was certainly an unlawful one, and the act of sailing to carry it into effect, must be considered as an overt act towards the execution. If so, the vessel was captured in the prosecution of an unlawful effort to break the blockade. This unlawful procedure on the part of the master was at least an invitation to capture, and does not entitle the plaintiffs to the aid of favorable presumption against the insurers.

But I cannot stop here. The breach of a blockade, in my opinion, does not consist merely in coming to the line of the blockading squadron, and attempting to pass it. Such a construction would open a door for innumerable frauds, and

United States, (February, 1808,) held, that the sentence of a foreign court of admiralty, condemning a vessel for breach of a blockade, was conclusive evidence of that fact, as between the insurer and the insured. Marshall, Ch. J., Cushing, J., Washington, J. and Johnson, J. in the affirmative. Chase, J. and Livingston, J. contra. Todd, J. not having heard the argument, gave no opinion. Washington, J. and Johnson, J. were the only judges who appear to have stated the reasons for their opinions. (See also *Fitzsimmons v. Newport Ins. Co.* 4 Dallas, 185.)

The same question was lately brought before the supreme court of Massachusetts, but the result is not known.

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expose belligerents to be deprived of all the material advantages of a blockade.

The most rational doctrine on the subject, I take to be, that forfeiture shall attach in every case, as for a breach of blockade, when a vessel is sailing for a blockaded port, with a notice of the blockade, unless the master proves expressly, that he had no design, either to break the blockade, or fraudulently to elude the blockading squadron. In the case before us, there is no such evidence, and, therefore, no such deduction can fairly be made in favor of the plaintiffs.

I lay out of the case our treaty with Great Britain, and the information given to the master at Cruxhaven, relative to turning vessels back for the first attempt to enter the blockaded port, without seizure.

The first is only applicable in cases where the master has no previous notice of the blockade, but cannot exempt him from the penalty annexed to a breach of the blockade, with full notice.

The second does not extend protection to vessels, the masters of which, with their eyes open, approach the line of blockade, for the purpose of breaking it. Besides, if the blockading squadron had, from motives of [*472] courtesy to neutrals, adopted such a practice, I take it the master of the plaintiff's vessel had no right to run the risk of that courtesy being denied to him at the expense of the insurers. The risk he assumed was his own voluntary act, for which he is accountable to his employers, but which can attach no responsibility to the defendants.

With respect to the second question, I am equally clear, that according to the sound construction of the policy, the defendants are not liable for the risk incurred beyond Hamburg.

The plain language of the contract and memorandum is, that the insurance, for the additional premium of 2½ per cent. was on a voyage from New York to Amsterdam, by the way of Hamburg, for the purpose of ascertaining the fact whether Amsterdam was blockaded. If it was, it would

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be dangerous to proceed to Amsterdam, and in that event the voyage was to terminate at Hamburg, and the additional premium to be returned to the plaintiffs. To suppose that the insurers meant to insure against the risk of entering a blockaded port, is to bottom the contract on an unlawful basis, because the very intent thereof, in that case, must have been to indemnify the plaintiffs for the loss incident to a violation of the law of nations. If so, the contract would be absolutely void.

But the supposition that such was the meaning of the contract, is repelled by the precautions used by the plaintiffs themselves. If the defendants had assumed the risk of proceeding to Amsterdam, when in a state of blockade, why did the plaintiffs agree to pay an additional premium for first going to Hamburg to ascertain the danger arising from the reality of the blockade? for that was the danger to which they expressly referred. Why stipulate that the risk should end at Hamburg, in case it should be found dangerous to proceed farther?

[*473] "These precautions evince, to my complete satisfaction, that it was neither understood, nor intended between the parties, at the formation of their contract, that the defendants should incur any risk beyond Hamburg, if it was there ascertained that Amsterdam was blockaded.

I am therefore of opinion upon the second question, that the capture of the plaintiffs' vessel and cargo, on the way from Hamburg to Amsterdam, while the latter port was in a state of blockade, was a peril not within the policy.

The result is, that according to my opinion, the judgment of the supreme court must be affirmed, but so modified that the additional premium of $2\frac{1}{2}$ per cent. be returned to the plaintiffs.

GOLD, Senator. The question in this cause is, whether the sailing of the brig Columbia from Cruxhaven, with a destination for Amsterdam, and an understanding that it was blockaded, is a breach of the blockade, and a legal cause of capture and condemnation? The question may be qualified perhaps, with the addition of an intention to enter the Texel,

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in the event only of the blockading squadron being blown off the coast ; so as to leave the port in fact, open for entrance. There is nothing in the verdict, or the assumption of facts, by Sir William Scott, as the grounds of his determination, to warrant the conclusion of an attempt to break the blockade, any further than the same is supported by proof of a sailing from Cruxhaven for Amsterdam. Upon fundamental principles, on which our municipal code of criminal law is established, mere intention, with some very peculiar exceptions, is not made the subject of judicial animadversion. That the moral law, which arraigns intention, should be adopted in the law of nations, with a greater latitude than in our municipal system, is a subject of some surprise, especially when the application is for the benefit of *belligerents, and to the prejudice of neutrals. In [*474] intention, there is nothing certain and permanent ; it is controlled by every reflection ; it is changed, dropped, and renewed by the occurrences of every hour ; by the constant vicissitudes to which the agent is subject. The enterprise, on a nearer view, appals ; the *locus penitentiae* is embraced. If there is an anticipation of the undertaking, by advances towards the theatre of action, (as the sailing from Cruxhaven in this instance,) how wide a space yet intervenes ! To the dominion of how many various causes is the intention subject, before the act could be completed ! The information of every hour may change the destination ; the receipt of counter instructions from the owner may arrest further progress ; the perils of the sea may overwhelm ; the information received at Cruxhaven that induced the sailing, may be contradicted ; and, lastly, before the vessel may arrive on the line of investment, the blockade may be, by instructions from the admiralty, withdrawn, or raised. The rule that the sailing with a destination for a blockaded port is a breach of blockade, as urged upon the court, is undefinable in relation to distance between the port of departure and that of destination, and will produce great uncertainty and vexation. Nothing is to be found in the verdict or facts stated, or assumed in the sentence of the admiralty, from

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which to infer the progress of the Columbia from Cruzhaven to the Texel; Sir William Scott meets her at the threshold, at the port of departure, and pronounces the sailing with an intention of evading the blockade, to constitute the offence. These are his words. It is fairly presumable, that the ground thus taken by the judge, corresponded with the proof, and was as broad as the evidence would justify. The record in the cause presents no fact to warrant a contrary conclusion. No inference is to be made from the plaintiffs' communication by letter of the 27th June, that the defendants consented to an attempt to enter a blockaded [*475] port, as that letter closes with the observation "that the blockade might probably be withdrawn before the arrival of the vessel. Therefore, quite the contrary is rather to be supposed. It is unnecessary to give an opinion on the case of an actual attempt to enter a port, during the interruption of the blockade, by reason of the blockading squadron being blown off; as, in this case, no such attempt was made, nor is the fleet found to have been so blown off. I am therefore of opinion, that there is no authority or precedent binding on this court to warrant the rule adopted by the admiralty sentence in this cause; that such rule is opposed to essential principles, uncertain in its application and highly vexatious to neutrals; that the principle of the late treaty between England and Russia is more propitious to the interests of commerce, and sufficiently favorable to the rights of belligerents, and merits high respect from all neutral powers; and that, therefore, the judgment below ought to be reversed.

The majority of the court being of this opinion, it was thereupon ORDERED and ADJUDGED, that the judgment of the supreme court be reversed, and the record be remitted, &c.

Judgment of reversal.(a)(b)

(a) See *supra*, 191, n. (b.)

(b) [Old note.] See *Williams v. Smith*, 2 Caines' Rep. 1. *Liotard and others v. Graves*, 3 Caines' Rep. 226. *Schmidt v. United States Ins. Co.* 1 Johns. Rep. 249. *Suydam and Wyckoff v. The Marine Ins. Co.* 2 Johns.

P. U. Duguet v. F. Rhinelanders and others.

***PHILIP URBIN DUGUET, *Plaintiff in Error*, [*476]
against FREDERICK RHINELANDER, AND OTH-
ERS *Defendants in Error*.(a)**

Where a subject of a belligerent state emigrates to this country, *flagrante bello*, and becomes naturalized, such naturalization will support a warranty of neutral property, in a policy of insurance; and the assured need not disclose to the insurer, the time of his emigration.

THIS cause was brought before the court, by writ of error from the supreme court. For the facts in the cause, and the opinion of the court below, see 1 Johns. Cas. 360.

VAN VECHTEN, Senator. The questions for our consideration are :

1. Whether the plaintiff's emigration and naturalization here, *flagrante bello*, entitled him to the national character, and protection of an American citizen, in relation to an enemy of France? and

2. Whether the circumstances of his emigration and naturalization did not materially increase the risk of the insurers, and therefore, ought to have been disclosed to them?

With respect to the first question, it appears to me to be the settled doctrine of the most approved writers on the law of nations, that emigration in time of war does not change the character of the emigrant, in relation to the parties at war. (Vattel, b. 1, c. 19, sect. 220 to 223; book 2, c. 27.) By the declaration of war he becomes a party to the contest between his government and the enemy. This situation attaches to it certain duties and responsibilities, from which he cannot by his own mere act absolve himself.

A contrary doctrine would be inconsistent with the soundest maxims of national policy, because it would encourage mercantile men, at the commencement of every war, to

Rep. 138. *Calhoun v. Ins. Co. of Pennsylvania*, 1 Binn. Rep. 293, 305.
Fitzsimmons v. Newport Ins. Co. 4 Cranch, 185.

(a) S. C. 1 *Caines' Cases in Error*, xxv.

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change their residence and character, in order to exempt themselves from the burdens and losses which are incident to a state of war.

[*477] *I therefore concur in the opinion of the supreme court, that the plaintiff's emigration and naturalization, *flagrante bello*, cannot, with respect to Great Britain entitle him to the rights of an American citizen.

But, independent of this question, I take it, that this court has settled a principle in the case of *Arnold and Ramsay v. The United Insurance Company*, (1 Johns. Cas. 363,) which is equally decisive against the plaintiff upon the second question.

In that case the property captured was also warranted to be American ; but because Hawley, one of the partners, was resident and engaged in trade within the Spanish dominions, although an American in fact, it was held, that his national character was thereby rendered so far questionable, in relation to the belligerents, as to render the disclosure of those circumstances necessary to render the policy valid.

In the present case, the emigration of the plaintiff, *flagrante bello*, placed his national character, with respect to the enemies of France, in a questionable and suspicious light, and thereby the risk of the capture of his property at sea was materially increased. This circumstance was therefore necessary to be disclosed to the insurers, and the omission to disclose it avoided the policy.

The conclusion upon both questions, in my opinion is, that the judgment of the supreme court ought to be affirmed.

GOLD, Senator. The first question arising for the consideration of the court, in this cause, is, *whether the plaintiff has verified his warranty of American property in the goods insured ?* The determination of this point involves the important question, whether the plaintiff is to be deemed, *for the purposes of commerce*, an American citizen. On this question, while the claims of a state upon its citizens, when surrounded and pressed by its enemies,

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are recognized ; while the course to which duty
 *prompts is plain, and readily perceived ; yet so dif- [*478]
 ferent are the circumstances of different states, so va-
 rious their policy, that the right of citizens to emigrate, dur-
 ing war, must, so far as respects the parent state, depend on
 the particular ordinances of each individual community.
 What might not be inconsistent with good policy, in a state
 possessed of an overflowing population, and but a scanty sub-
 sistence, would be quite different from that of a state with a
 thin population, requiring all her hands for defence, and with
 sufficient bread for all her citizens. Was the condition of all
 nations alike in this respect, was the same reason and neces-
 sity for prohibiting emigration during war common to all,
 the rule contended for by the defendants, would have been
 long since settled, as *a fundamental principle of the law*
of nations, and expressed in language too unequivocal to
 admit of a doubt at this period.

If a state is assailed by external enemies, and requires for
 defence the united efforts of all its citizens, of all those to
 whom it has given birth, a prohibition against emigration,
 as we have witnessed in France, by the ordinances of 1704
 and 1744, will attain all that is necessary in this respect, to
 the safety and defence of the state. If such prohibition is
 not interposed, the door is open to emigration. But is an
 emigration, which is lawful in relation to the parent state,
 equally so in reference to the enemy of such state ? As a
 general rule it is so. At the same time, should the citizens
 of a belligerent power, in concert with the state, or for the
 purpose of multiplying the warlike resources, or aiding the
 enterprises of the state, emigrate to, and take a stand in a
 neutral country, in order to mask mercantile projects under
 a neutral flag, there can be no hesitation in pronouncing
 such emigration *fraudulent*, and that an establishment and
 residence for such unwarrantable purposes, cannot acquire to
 the emigrant a neutral domicil ; he still would continue a
 member of his native family, and as such must participate in
 and be affected by the fortunes of the parent state.

When such a case is brought *before the court, such [*479]

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a determination will be had, as will preserve to the belligerent the full exercise of its rights over the property of its enemy. But because the right of emigration may be abused in time of war, it by no means follows that such right does not exist; and though it may be difficult to detect and punish such abuses, the argument from thence, against the right, cannot prevail.

As far as appears from the record in this cause, the emigration of the plaintiff proceeded from a common principle of action that prevails more or less in all periods, and all countries; for the subsistence of himself and his family, he removed to and acquired a *domicil* in this state. This *domicil*, upon general principles, confers, for the purposes of commerce, the right of an American citizen. Native Englishmen *domiciled* in America, by a decision of Westminster Hall, participate the rights of American citizens, in relation to trade between America and the East Indies.^(a) It will be unnecessary to consider whether the situation of the parent state was not such, at the period of the plaintiff's emigration, as to have no claims upon its citizens; as rent with factions and violence, and yielding no protection. Upon the point of *undue concealment*, raised in the cause, after the foregoing opinion, it will be necessary only to add, that if the faith of contracts should be deemed to have required of the plaintiff a disclosure of his condition, *as affording a pretext for condemnation, undue concealment* is a fraud, odious in law, and as such, not being found by the verdict, is not to be presumed. For the foregoing reasons, the judgment of the supreme court ought to be corrected, and the judgment here should be as for a total loss.

The majority of the court being of the same opinion, it was therefore ORDERED and ADJUDGED, that the judgment of the supreme court be reversed, and the record remitted, &c.

Judgment of reversal.^(b)

^(a) [Old note.] See *Wilson v. Maryatt*, 8 Term Rep. 31; affirmed, in error, see 1 Bos. & Pull. 430.

^(b) See *supra*, vol. 1, 366, n. (a), and 368, n. (a) to *Arnold v. United Insurance Co.*

***NICHOLAS GOIX, *Plaintiff in Error*, against [*480]
NICHOLAS LOW, *Defendant in Error*.**

In an action on a policy of insurance, the words condemned as *lawful prize* in the sentence of a court of admiralty, affords no necessary inference that the vessel was enemy's property; and such sentences are not conclusive evidence of the fact.

THIS cause came before the court, by writ of error from the supreme court. The facts contained in the special verdict were the same as those stated in the report of this case, and that of *Goix v. Knox*, 1 Johns. Cas. p. 337—341.

After argument, the court reversed the judgment of the court below, on the ground, that being condemned as *lawful prize*, afforded no *judicial inference* of the vessel's being *enemy's property*,^(a) as there may be other just causes of

(a) Mr. Phillipps, in the eighth edition of his work on Evidence, states that "If no special ground is stated, and the ship is condemned generally as *lawful prize*, it is to be presumed from the condemnation, as no other cause appears, that the sentence proceeded on the ground of the property belonging to an enemy; and the sentence, in such a case, has been held to be conclusive evidence that the property was not neutral;" and he cites *Salucci v. Woodmas* to support the position. Mr. Justice Radcliff, in his opinion above, (1 Johns. Cas. 342,) observes, "I think the sentence is to be considered as proceeding on the want of neutrality. Its silence will not authorize a different conclusion. Enemy property forms the general ground of condemnation. If founded on a special or different ground, it would probably have been stated, or might be made to appear from the libel, or the proceedings upon it, to which it must have referred. No other being shown, an extraordinary cause of condemnation cannot be presumed. This interpretation of silent sentences was adopted in the case of *Salucci v. Woodmas*, and appears to be natural and just."

This doctrine, however, has been expressly denied in *Bailey v. South Carolina Ins. Co.* (1 Nott & M'Cord, 544, n. b,) and Nott, J. after reviewing the English cases, came to the conclusion that the weight of authority in England was against *Salucci v. Woodmas*. Messrs. Cowen & Hill, in their Notes, (vol. 2, p. 884,) remark: "In Pennsylvania, where the question was whether certain property was *American*, conformably to a warranty in a policy of insurance, held, that inasmuch as the libel stated contradictory causes of condemnation, and the decree was general, so that the precise grounds of it could not be ascertained, evidence was admissible on the part of the plaintiff,

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condemnation ; and the sentence of the court of admiralty not being conclusive,(b) there were no circumstances in the case, authorizing a condemnation, nor showing a breach of warranty.

Judgment of reversal.(c)

to show that the property was *American* : and it distinctly appearing from the proof that such was the character of the property, Shippen, J. said : ' We cannot presume that the judge of a foreign court has perjured himself, by declaring that property to be *French*, which we know to be *American* ; and of course we must assume the position, that his decree proceeded upon the other allegations in the libel,' viz. those which conceded the property to be *American*. (*Vasse v. Ball*, 2 Dall. Rep. 270, 275. S. C. 2 Yeates' Rep. 178. See *Crousillat v. Ball*, 3 id. 375.)

" And in South Carolina, where the libel alleged one ground of condemnation, and the sentence another, held, that it was such a case of ambiguity, as to afford ground for opening the decree and suffering the parties to go into evidence on both sides. (*Blacklock v. Stewart*, 2 Bay's Rep. 363. See S. P. *Williamson v. Tunno*, id. 388.)

" The same doctrine was held in Maryland, where the decree was ambiguous, so that the precise grounds of it could not be gathered from it. (*Gray v. Swan*, 1 Har. & Johns. 142.)

" In Massachusetts, where the sentence, after alleging a rescue from the possession of a belligerent captor, proceeded to declare, that for that cause, or otherwise, the vessel was condemned, held, that the assured might disprove the alleged rescue, and that the sentence was no more than mere *prima facie* evidence. (*Robinson v. Jones*, 8 Mass. Rep. 536.) Not so, however, where the sentence after stating one sufficient cause of condemnation, proceeded to condemn the vessel for that cause, adding, and for other sufficient causes. In this case, the sentence was held conclusive against the insured as to the ground specially set forth. (*Baxter v. The New England Mar. Ins. Co.* 6 Mass. Rep. 277. See S. C. 7 id. 275.)

" In New York, we have already seen that the sentence of a foreign admiralty court, is conclusive to change the property, but is only *prima facie* evidence to affect a warranty or representation in a policy of insurance. (See 2 Cowen & Hill's Notes, p. 883, note 626.) And where the libel alleged various and inconsistent causes of condemnation, and the sentence pronounced the vessel as forfeited ' for a breach of some or one of the laws relating to trade and navigation ;' Spencer, Senator, regarded it as equivalent to saying that the condemnation was for some cause or other, and consequently proved nothing as between the insured and underwriter. (*The Ocean Ins. Co. v. Francis*, 2 Wend. Rep. 64, 74 ; and see per Walworth, Ch. id. 69, 70.)"

(b) See *supra*, 144, n. (b) to *Vandenheuvel v. The United Ins. Co.* and also S. C. *supra*, p. 452.

- (c) [Old note.] From the cases of *Pollard v. Bell*, *Bird v. Appleton*, (8 Term Rep. 434, 562 ;) *Price v. Bell*, (1 East, 663 ;) and *Fisher v. Ogle*, (1

***JAMES JOHNSTON AND ROBERT WEIR, *Plaintiffs* [*481]
in Error, against DANIEL LUDLOW, Defendant
in Error.(a)**

A subject of Great Britain *domiciled* in New York, and engaged in trade from the United States with the enemies of Great Britain, is considered as a citizen of the United States in regard to such trade, which is not within the clause in the policy of insurance by which the property is warranted by the assured free from any charge, &c. in consequence of a seizure or detention for or on account of any illicit or prohibited trade, &c.

A sentence of a court of admiralty is only *prima facie* evidence of any fact, and will have no effect, if sufficient appears in the sentence to rebut the presumption of the existence of such fact.

To constitute a breach of the warranty by the assured against seizure or detention on account of illicit or prohibited trade, &c. there must be an illicit or prohibited trade, in fact, existing. It is not sufficient that there has been a *condemnation* under *pretext* of such a trade.

THIS cause was brought before this court, by writ of error from the supreme court. The plaintiffs in error, who were natives of Great Britain, residing and engaged in trade in New York, but not citizens of the United States, chartered the schooner *Aurora*, of Peter Laing, for a voyage from New York to La Vera Cruz. A policy of insurance was effected on the cargo from New York to La Vera Cruz, with liberty to touch at the Havanna. The assured knew at the time, that the plaintiffs in error were not American citizens. The defendant in error also knew, that the *tin* was on board, and consented to insert in the clause relative to illicit trade, and after the word detention, the words "of the goods hereby insured," and which were inserted to save the assured, in case the *tin* should be adjudged contraband. The other facts in the case were the same as those stated in the case of *Laing*

Campb. N. P. Cases, 418,) it seems now to be the opinion of the English courts, that where the sentence of the foreign court of admiralty condemns merely as *good and lawful prize*, without adverting to the question, whether it is neutral or enemy's property, such sentence is not conclusive.

(a) S. C. 1 *Caines' Cases in Error*, xxix.

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v. *The United Insurance Co.* in the supreme court, reported *ante*, p. 174, 179.

The sentence of the judge (Kelsall) of the vice-admiralty court at New Providence, pronounced August 2d, 1799, was as follows :

"The Aurora is an American vessel, bound to La Vera Cruz, by way of the Havanna, whither she is first to go, laden with property purchased and shipped in America. Under these circumstances only, I cannot deem her an adopted vessel ; whatever she may become, she is not yet privileged.

As to the presumption of the property being enemy's, [*482] I think there is some, and indeed *not a little obscurity in the whole transaction. The vessel is entitled to a register, and has it not, nor is any reason shown to account for the deficiency. The multiplicity of needless marks, by which the packages are distinguished ; the many unnecessary invoices, none of which are signed, so contrary to the usages of commerce and the practice of merchants ; the great amount of the charter-party, and the very large quantity of articles, the property of the captain ; the caution with which Weir, the supercargo, swears as to the property, coupled with some part of the master's and mate's answers to the standing interrogatories : these, I say, are what might have induced me to decree further proof, were there not circumstances in the case fully to warrant the decision I have come to on the subject.

" *These are principally the contraband of war, which are on board, and the relation the parties who ship them stand in, as well with respect to this particular transaction, as generally to their duty towards Great Britain.* It appears that all the individuals concerned are natural born British subjects, but assume the privilege of trading with the king's enemies, as being citizens of the United States of America.

"1. Peter Laing, the master, swears that he has sailed out of America sixteen years past ; is a citizen, and resides with his wife and family at New York.

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"2. Donald Denoon, the mate, swears he has been admitted a citizen of the United States about twelve months.

"3. Patrick Weir, the supercargo, swears that he has resided in America four years and considers himself a citizen of the United States, having made application to be admitted as such.

"4. James Johnston, one of the owners of the cargo, Laing swears is an American citizen, to the best of his knowledge.

"5. Robert Weir, the other principal owner of the [*483] cargo, is sworn by Laing, to be also to the best of his knowlege a citizen, and he moreover swears he has known him five years.

"It therefore results from this evidence, that Patrick Weir is a British subject, that Donald Denoon, cannot, notwithstanding his admission as a citizen of America, be considered such, his case depending, (as far as this court has any thing to do with it,) on *Hughes' case*, already decided; and that the right to be taken for, and deemed an American citizen, supposing the treaty of amity and commerce to be so conclusive as it is contended to be, is by no means shown, or made out in the cases of James Johnston and Robert Weir. Laing's case is of a different complexion; he has resided in the American states since 1783; and as it may be expected from me, I do not hesitate to add, that after maturely considering the relative situation and connection between Great Britain and America; and after duly estimating the necessity imposed by the circumstances of the times, on the officers of the admiralty courts, to resist the increase of an evil already carried to an alarming excess, the emigration of British subjects, for the purpose of screening themselves from the general effects of the war their country is engaged in, and of embarking in commercial enterprises, of whatever nature, with the enemy, under the protection of neutral flags; I do not think that I ought to assume a period earlier than the commencement of the war with France, as the epocha from which the natural born subjects of Great Britain, though naturalized and commorant in a neutral state, are to be viewed

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and considered, with respect to their native country, in any other light than as those who remain at home. Those who have settled in America before that period, I must leave in the possession of those rights, which they appear, by [*484] the tacit consent of Great Britain, to have "hitherto exercised unmolested. It would have been on these principles, and on that of not being convinced as to the real ownership of this property, that I should have decreed further proof, with respect to Weir and Johnston, had it not been for the contraband of war, which they have shipped on board this vessel.

"Tin plates are assuredly contraband. They are indispensably necessary to the equipment of all armed vessels, and form a most essential article in ordnance and military stores. Now, though, in this case, the value of them is justly considerable, six hundred pounds, currency, at the least; yet, I confess, it appears to me so strange, that for the sake of the profits on this sum, merchants would endanger a very valuable cargo, that I am induced to think, that Johnston and Weir were only complying with an order, or that Spain insists on a portion of every cargo being contraband, to entitle a vessel to entry in certain ports. Be it however as it may, I must do my duty; a duty in this instance especially incumbent on me rigidly to execute, from the situation those men stand in, with respect to their native country, by enforcing the strict law of nations, as laid down in *Lee on Captures*, a law which is not altered in any respect by the American treaty, and is conformable to the practice of the high court of admiralty at home, as we know from the highest authority.

"I do, therefore, hereby dismiss the answer and claim, as far as respects the property of Patrick Weir, Donald Denoon, James Johnston and Robert Weir, and condemn the same as lawful prize to the captors.

"I sentence the claimants in costs, and dismiss the libel with respect to the vessel and property of Peter Laing."

On the argument of the cause, three questions were raised for the consideration of the court. 1. Whether the

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trade, in regard to the characters of the plaintiffs, *was illicit? 2. Whether *tin* in blocks and plates is an [*485] article contraband of war? 3. Whether the warranty contained in the special clause in the policy, in regard to illicit or prohibited trade, or trade in articles contraband of war, extended to a seizure or detention, on the allegation of being engaged in such trade, when, in fact, there was no such trade?

GOLD, Senator. On the first point, the *domicil* of the plaintiffs being established here, without any fraudulent motive, but for fair purposes of commerce, this court ought not to sanction the right of Great Britain to seize and confiscate their effects, as has been done in this instance. The case of *Maryatt v. Wilson*, cited from 1 Bos. & Pull. Rep. p. 430, which arose under the article in our late treaty with England, regulating our East India trade, is not inapposite. In that case, the English court conceded to a native subject domiciled in America, the right of an American citizen, in relation to commerce with the Indies. On the second point, that there may be circumstances and occasions, in which *tin* in blocks and plates, may become contraband, is not to be controverted; but while Judge Kelsall professes to detail, not only the causes for condemnation, but those on which he did not ground himself, he does not disclose a case which would warrant the conclusion, upon the article in question, of contraband of war. He rests himself upon the bare shipment of the article; this cannot be subscribed to, nor will the allowed effect of the admiralty sentence, as *prima facie* evidence, avail the defendant here; as the presumption of facts to warrant a condemnation, is repelled by a detail of the precise grounds on which the sentence was pronounced. On the last point raised by the underwriter, that the warranty protects him against *any loss by seizure or detention, for, or on account of any illicit trade or contraband of war*, nothing *in this provision is relevant to the [*486] case before the court. The clause literally extends only to partial losses occasioned by a seizure or *temporary detention*, not followed by a *condemnation*; and if extended

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farther, it cannot have been the intention of the parties to the policy to throw upon the assurer a loss, where there could be no fault in him; when no illicit trade or contraband existed in fact, merely because a pretext of that kind is set up to cloak the condemnation. The expression, "*for and on account of,*" is not equivalent or convertible into the words *under pretence of*, but may well be understood to mean *for the cause of*; implying the actual existence of either illicit trade or contraband, as producing such loss or damage. No other construction ought to be admitted, unless the language of the contract is plain and unequivocal, necessarily inducing a contrary interpretation. The facts in the cause do not, as the law is now settled in Great Britain, bear out the conclusion of the vice-admiralty court; nor can any thing in the warranty of the assured protect the underwriter. I am of opinion that the judgment of the court below ought to be reversed.

This being the opinion of a majority of the court, it was thereupon ORDERED and ADJUDGED, that the judgment of the supreme court be reversed; and that the plaintiffs in error recover the sum assessed by the jury in the special verdict, as for a total loss; and that the court below tax the costs for the plaintiffs in error, as if judgment had been given for them as for a total loss; and that the plaintiffs in error also recover interest on the judgment so found for a total loss, from the time of rendering the judgment in the supreme court, until the third Tuesday of April next, to be assessed and taxed by the clerk of this court, and that the record be remitted, &c.

Judgment of reversal.(b)

(b) See 1 Phillips on Insurance, 712, 715; 2 id. 698. 2 Duer on Insurance, 633, and n. (a) and 3 id. under the head of Excepted Risks.

Hitchcock v. Sable.

*PETER LAING, *Plaintiff in Error, against THE* [*487]
 UNITED INSURANCE COMPANY, *Defendants in*
Error.

THE SAME *against* THE SAME.

THE SAME *against* THE SAME.

THESE causes were also brought before the court, by writs of error from the supreme court, (see *ante*, p. 174, 179,) and the same questions arising as in the preceding case of *Johnston and Weir v. Ludlow*, the judgments of the supreme court were reversed for the same reasons.

Judgment of reversal.

FREDERICK RHINELANDER, WM. KENYON AND OTHERS,
Plaintiffs in Error, against JOHN JUHEL, Defendant
in Error.

THIS cause came up on a writ of error from the supreme court; (see *ante*, p. 121,) and after argument, the court ORDERED and ADJUDGED, that the judgment of the court below be affirmed, and the record remitted, &c.

Judgment of affirmance.

*STEPHEN HITCHCOCK, *Plaintiff in Error, against* [*488]
 EFFY SABLE, *Defendant in Error.*

THIS cause came before this court by writ of error from the supreme court, (see *ante*, p. 79,) and after argument *the court* ORDERED and ADJUDGED, that the judgment of the supreme court be affirmed, with costs, &c.

Judgment of affirmance.

Livingston v. Rogers.

JOHN R. LIVINGSTON, *Plaintiff in Error, against* WILLIAM ROGERS, *Defendant in Error.*(a)

Parol evidence of the contents of a letter of attorney, by the person to whom it was given, is admissible, if it is proved satisfactorily, that such power has been lost [without bad faith.]

Upon the admission of such testimony, should the trial disclose evidence or reasonable grounds of suspicion of a suppression of the instrument, of *male fides* in the person offering the testimony, or should the evidence of its existence and legal efficacy not be clear and satisfactory, it will become the duty of the judge to direct and charge the jury for the defendant. *Per Gold, Senator.*

THIS cause came before the court, on a *bill of exceptions* to an opinion of a judge of the supreme court, at the circuit.

The plaintiff here, who was also plaintiff below, commenced an action in the supreme court, to recover from the defendant the difference on a stock contract, dated the 19th of March, 1792, by which the latter promised to receive from him twenty shares of the bank of the United States, on the 1st of June, 1793, and to pay for them at the rate of 78 per cent. advance.

The defendant pleaded *non assumpsit*.

[*489] *On the trial the plaintiff, to establish a tender of the stock, offered a witness, who proved, "that on the 1st June, 1793, he attended in person at the banking house of the United States, in the city of Philadelphia, at the request of the plaintiff, and, as his attorney, to transfer twenty shares of the said bank stock to the defendant, pursuant to the agreement stated in the declaration; that a few days previous to his attendance at the banking house, he received from John Wilkes, a notary public, residing in the city of New York, a letter of attorney, signed by the plaintiff, with whose hand-writing he was well acquainted, and the execution of which was attested by the said Wilkes, in his capa-

(a) S. C. 1 Caines' Cases in Error, xxvii.

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city of notary, and under his notarial seal; that he attended with the said letter of attorney, and twenty shares of the bank stock aforesaid, at the banking house, on the said 1st day of June, and continued there during all the time when the said stock could be transferred, and offered, by virtue of the said letter of attorney, to transfer the said twenty shares to the defendant, for and in behalf of the plaintiff. That he gave several days' notice to the defendant, by directions of the plaintiff, that he should attend at the said bank, on the said day, for the purpose aforesaid.

"That no person appearing to receive or pay for the said stock, he left the said banking house without making an actual transfer thereof, and put the said letter of attorney into his iron chest, of which he alone kept the key. That he never delivered the said letter of attorney to the plaintiff, and, that the plaintiff never had or saw it after his offer to transfer as aforesaid. That he considered the said letter of attorney as belonging to himself, and that the plaintiff never gave him any directions to keep or destroy it. That he did not know it would be of any use to produce the said letter of attorney on the present trial. That since the commencement of this action, he has searched among his papers in the *iron chest and elsewhere for the letter of [*490] attorney, but cannot find it, and verily believes he has destroyed the same, not thinking it of any utility to be preserved."

Wilkes was also produced as a witness for the plaintiff, and deposed, "that he never delivered a letter of attorney out of his office to transfer any species of stock, until the party making it had acknowledged the execution of it before him, although he had sometimes delivered letters of attorney, which contained a blank for the attorney's name."

The plaintiff's counsel then offered to give *parol* evidence of the contents of the letter of attorney, to which the defendant's counsel objected. The judge allowed the objection, and determined that the plaintiff should not be permitted to give *parol* proof of the contents of the letter of attor-

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ney. To this opinion of the judge the plaintiff's counsel tendered a bill of exceptions ; on which he brought a writ of error, returnable to this court.

A verdict was taken for the defendant, and judgment given thereon.

LANSING, Chancellor. The loss of the letter of attorney is not attributed, in this case, to *inevitable* accident, and the question to be decided, is, whether this is a case in which parol proof of its former existence and import is admissible.

That the exception to the strict rule of law, originally extended only to writings destroyed by inevitable accident, or withheld by the party opposed in interest to their introduction, is not contended. But on the part of the plaintiff, it is insisted, that an enlarged liberality has progressively obtained, and that to entitle the party to resort to parol proof of the contents of a deed, nothing more is necessary than to show that the incapacity to produce it, is not attributable to his positive fault, so as to involve a *mala fides*.

[*491] *The decisions of the English courts, since the period Lord Mansfield began to preside in the court of king's bench, have assumed a degree of liberality in adopting the ancient principles of jurisprudence, not only to the exigencies which the extent and activity of modern commercial speculations have rendered unavoidable, but to every object of commutative justice which can affect the interests of the members of a great and opulent community.

In the general relaxation which has obtained, the strictness of this rule of evidence has, however, as it appears to me, been completely preserved ; and, if, in the multifarious complications incident to the state of property in Great Britain, its intrinsic worth has so effectually resisted constructive innovations, it is a strong argument of its correctness and utility.

That it has been so preserved, I think, must appear evident from a review of the cases which have been cited, to induce this court to pronounce the present case within the exception to the rule.

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The general rule, as laid down in 10 Co. Rep. 93, is, that, as the best evidence the thing is capable of, the existence of the deed must be proved by its production. (Gilb. Law of Evid. 93.)

1. To enable the court to determine on its legal operation.
2. To show, that it is genuine, and not factitious; to which is added,
3. That it was not made on condition, as with power of revocation.

But great and notorious extremities, as by casualty of fire, and that all evidences were burnt in the party's house, are deemed exceptions. (10 Co. 93.)

This doctrine is corroborated by some other cases, (Jenk. Cent. 19; 1 Inst. 227, b,) which leave no doubt that great and notorious extremities only, were admitted *as exceptions; thus, loss by burning of houses, by [*492] rebellion or robbery, are instanced.

The case of *Villiers v. Villiers*, cited in argument, from 2 Atk. 71, lays it down generally, that parol evidence of a deed may be given, and the manner of its being lost, unless it happens to be destroyed by fire, or lost by robbery or any other unavoidable accident which, it is added, are sufficient excuses of themselves.

It could certainly never have been the intent of the reporter to make Lord Hardwicke say, that evidence of the *manner of the loss* might be given, unless it was destroyed by fire, &c. which, as it was a sufficient excuse, must necessarily render such proof useless, and yet such is obviously the scope of the expression. How then were the court to discover the manner of the loss, if it was a fact, respecting which no evidence was to be admitted?

The case is silent as to the facts to which these observations applied; but we find the case reported in Barnadiston's Chancery Reports, 307. There it appears, that deeds were alleged to be lost; that the lord chancellor declared it "doubtful whether there were such deeds;" but instead of directing an issue to determine whether the deeds had existed, and were so lost as stated, which seem the points raised by him in discussing the case, he directed an issue to try the validi-

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ty of those deeds. But the broad principle laid down in Atkyns is not even glanced at.

This case is so loosely and inaccurately reported, that I think little reliance can be placed on either of the reports for the exposition of the rule.

In the case of *Saltern v. Melhuish*, (Ambl. 247,) the precise point before the court was, whether the evidence of the destruction of the deed was sufficient ?

It is stated in that case, that Roger Melhuish had burnt the deed of assignment of a term, which the plaintiff claimed under, and evidence was given of the contents ; [*493] "that the deed of settlement in pursuance of which the deed of assignment was made, was in custody of Lady Berry, the surviving trustee therein named ; that she had expressed apprehensions, a few days before her death, that it would be taken away by Roger, with whom she then lived ; that after her death, search was made for it by her trustees, and that it was missing, and one of the witnesses said, that she had often been present when Roger's wife quarrelled with him for not destroying the deed.

The lord chancellor observes, that evidence of loss or destruction generally depends upon circumstances ; and it is very rare, even in case of destruction, that positive proof can be had.

If it was necessary to lay down the general rule with greater latitude, to comprehend this case, it must have been extremely strict, for it certainly presents a combination of strong circumstances ; the deed was in possession of Lady Berry, a few days before her death ; she lived with Roger Melhuish ; it was sought for in vain after her death ; Roger destroyed the assignment ; his wife quarrelled with him, because he had not destroyed the deed of settlement, which of consequence showed, that he had it in his possession. These circumstances established the most forcible presumptions against Roger, that he had either destroyed or secured it ; and either being established, parol proof of the import of the deed was admissible, on the ground of relief against spoliation.

The case of *Read v. Brookman*, (3 Term Rep. 151,) merely proves, that in the court of king's bench, in England, the

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form of declaring has been altered to obviate the difficulty of maintaining an action on a deed lost or destroyed. The new form was devised to get rid of a technical nicety, and to permit the party, in case of loss and destruction, to prove the circumstances of the loss and the import of the deed to the jury, instead of *stopping him [*494] at the threshold, by requiring its actual production, at the time of filing the declaration. It cannot, therefore, bear upon the present case, even if it could be considered as authority.

This court is now to determine a general rule of evidence ; if it is precisely defined and well understood, it becomes an authority, by which all the courts in the state are to regulate their conduct. Hence it becomes important to consider its tendency.

In the cases cited, the instances to which the exceptions of the rule apply, are loss by fire, rebellion and robbery. All these involve circumstances, supposed to be beyond the control of the party ; they are either the effect of inevitable accident, or of the acts of others committed in violation of law. None of them go the length of this case ; and as far as the general rule is applied to particular cases, there is no instance among the cases adduced in argument, or any others which I have been able to discover, in which it has been extended beyond these narrow limits.

It is true, analogies appear to have been contemplated, but they were strict, and from the application of the general expressions respecting them, they appear not to have been established with any degree of latitude.

If a departure is permitted, in construing the extent of this exception, from cases of accident *not in the power of the party to control* ; if it is assumed as a rule, that the *neglect* of a party, or, as it is termed in legal phraseology, *his laches*, is to operate to make that evidence which originally was not so, a door is opened to every species of contrivance, which the ingenuity of interested and wicked men can suggest. If a deed is defective, so as not to stand the test of legal investigation, secreting or destroying it will render it valid. If it is incapable of being proved in the ordinary mode, evidence

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of its existence and loss will supply the defect ; and if it contains a clause of revocation on condition, a similar operation will render it absolute.

[*495] *It was the business of the plaintiff to preserve his evidence ; it was an inexcusable neglect, to leave it exposed to destruction from a want of care ; and that it was left in the hands of his attorney, who destroyed it as useless, is no reason for permitting him to resort to a species of proof which would otherwise be incompetent.

I have supposed, in treating of this subject, that the destruction of the deed was fully proved ; that however is not the case ; it was put in an iron chest ; it was searched for there and elsewhere ; it was not found, and from these circumstances, the witness believes he has destroyed it. Whatever his belief may be on this occasion, this court, if they suffer his testimony to weigh in their decision, must, from the facts stated, be induced to believe with him. From those facts it is possible, nay, it is probable, that the deed may not have been destroyed.

I have not adverted to the observation made in argument, that this is a stock contract, which merits no peculiar indulgence. I think this consideration may be well admitted as a reason for not relaxing the rule of evidence in its favor.

Upon the whole, I have no doubt but that the opinion of the judge who tried the cause was correct, and I am, therefore, for affirming the judgment.

GOLD, Senator. The question upon the bill of exceptions interposed in this cause, is, *whether it be competent for the plaintiff to give parol evidence of the contents of the letter of attorney to M'Evers, under the circumstances detailed in the bill of exceptions, or must the instrument itself be produced ?* The ancient rule of the common law was highly rigid in this respect. It dispensed with the production of instruments, in a few select cases, and then only for peculiar and specific causes. But experience under that rule, has, in the progressive improvements of English jurisprudence, resulted in a relaxation of the law on this subject. The non-production of instruments is now excused, for reasons more general, less specific, upon grounds

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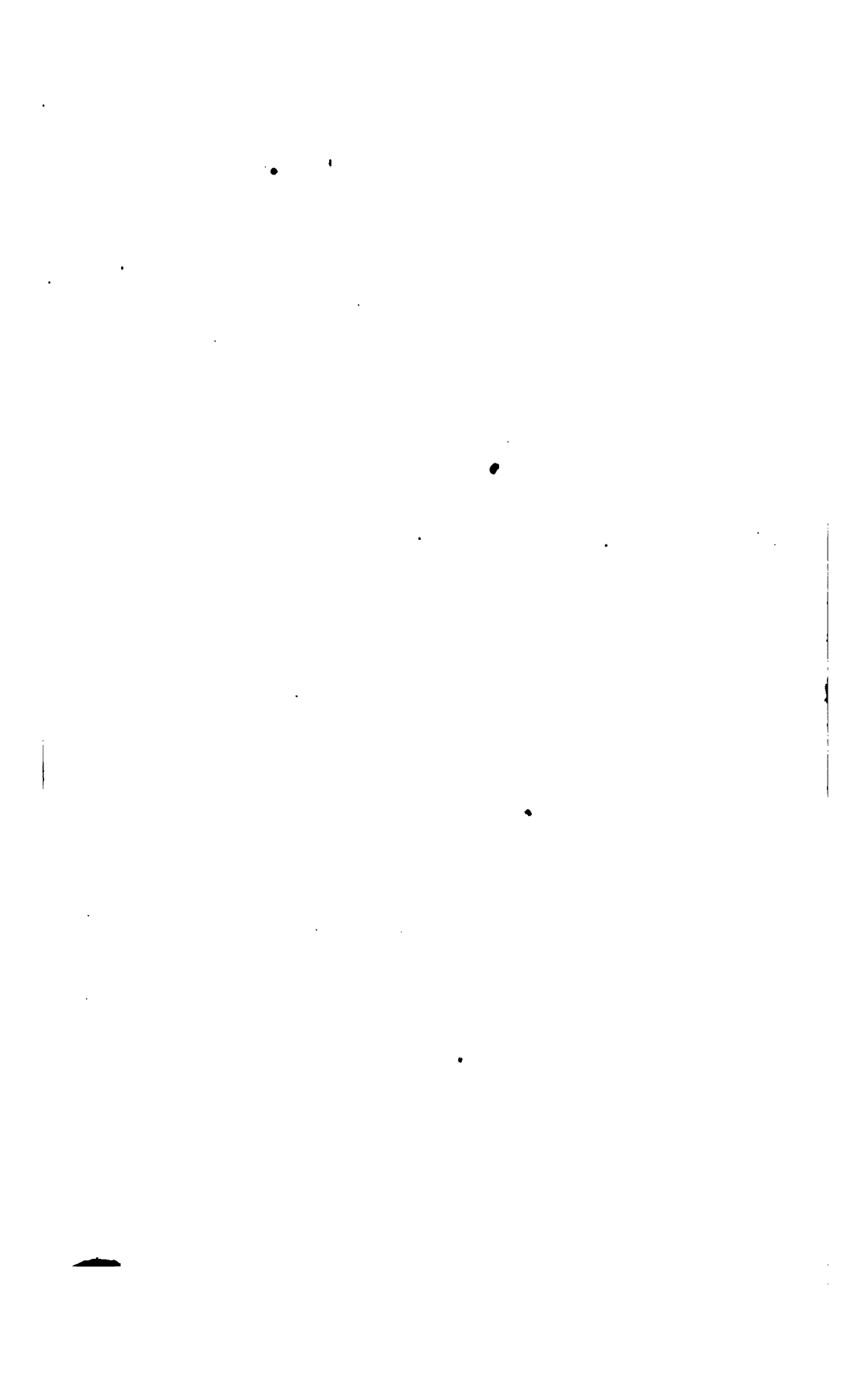
more broad and liberal than were formerly admitted. In *Read v. Brookman*, (3 Term Rep. 151,) a declaration on a deed was sustained, and the *profert dispensed with*, upon the general allegation of a loss by *time and accident*. In *Beckford v. Jackson*, (1 Esp. Rep. 337,) the plaintiff counted on a deed *lost or mislaid*; upon which issue was taken, and the same was recognized, as warranted in law, by Lord Kenyon, who presided at the trial. Other cases are to be found in the English reports, of similar import, sanctioning the same principle. Upon the authority of those cases, and the reason of the thing, I am of opinion, that parol evidence of the contents of the letter of attorney to Mr. M'Evers ought to have been received, and that, therefore, error has intervened in this respect. Upon the admission of such testimony, should the trial disclose evidence, or reasonable grounds of suspicion of a suppression of the instrument, of *mala fides* in the plaintiff, or should the evidence of its existence and legal efficacy, not be clear and satisfactory, it will become the duty of the judge to direct and charge the jury for the defendant. A *venire facias de novo* must, therefore, be awarded.

A majority of the court being of the same opinion, it was thereupon ORDERED and ADJUDGED, that the judgment below be reversed; that the record be remitted, and that a *venire facias de novo* be awarded.

Judgment of reversal.(b.)

(b) The principle of *Livingston v. Rogers* has been so generally affirmed, that it is utterly unnecessary to cite authorities in its confirmation. The English authorities will be found in 1 Phillippe's Evidence, Cowen & Hill's ed. 452, *et seq*; Starkie's Ev. ed. 1842, p. 394; Gresley's Eq. Ev. 268. The American cases are collected with vast labor in 2 Cowen & Hill's Notes, p. 1214-1233. See also Mr. Greenleaf's work on Ev. ed. 1842, vol. 1, p. 593, 594.

END OF THE CASES IN ERROR.



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Ray, Lansing et al. v. Bogart et al. 432.

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ACT TO LAY A DUTY ON STRONG LIQUORS, AND FOR REGULATING INNS AND TAVERNS.

I. *Power of Two Commissioners to grant License.*

II. *Liability of Licensed Tavern Keeper who retails Liquors after License expired.*

I. *Power of Two Commissioners to grant License.*

1. In an action *qui tam* for the penalty given by the tavern act, for retailing strong liquors, without a license : it was held, that a license granted by two of the commissioners of the excise, without the presence or consent of the supervisor, and when they were not assembled for the purpose of granting licenses, was illegal and void ; and such a license, though regular on the face of it, is no justification of the tavern-keeper, who is liable for the penalty. *Palmer, qui tam, &c. v. Doney, 346.*

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2. But a tavern-keeper who has a legal and competent license, is not liable for the penalty, for retailing liquors after his license has expired, and before the time of the next meeting of the commissioners of excise, for the purpose of granting licenses. *Palmer, qui tam, &c. v. Doney, 346.*

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refusal by him, and notice thereof to A. were sufficient to entitle C. to recover against A. on his guaranty, without a previous suit against B.

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3. The affidavit on which a motion is made for a commission, ought to state that there are material witnesses to be examined at the place to which the commission is to be directed. A general affidavit that material evidence is to be obtained in the cause, is not sufficient.

Franklin v. The United Insurance Company, 68.

Cases and authorities, 68, n. (b)

4. A commission to examine witnesses will not be granted to a defendant, so as to stay the proceedings in the cause, unless the party swears positively that he has a good defence on the merits, and that the witnesses named are material. *Franklin v. The United Ins. Co.* 285.

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Cases and authorities, 116, n. (b.)

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I. *Ratification of Acts of, by assent.*

1. Where A. had received from B. the note of C. to collect, and C. being reputed insolvent, and having absconded, D. in behalf of C. offered to pay A. 13

shillings and 4 pence in the pound, for the debt, and this proposal being communicated to B. he made no objection, and A. afterwards settled the note with D. at that rate; it was held, that A. was not responsible to B. for more than the sum he received of D. the silence of B. amounting to an assent to the proposal, and a ratification of the act of A.

Armstrong and Barnwall v. Gilchrist, 424.

Cases and authorities on the maxim, *Omnis ratihabitio mandato equiparatur*.
430, n. (a.)

II. *Lien of Insurance Broker on Policy.*

2. A. the master of a vessel, directed B. as his agent, to get his commissions as master insured, and C. the broker, had the policy effected in the name of B. on the commissions of the master, who was named in the policy, and the agency of B. was known to the broker. A total loss having been recovered by the broker, A. brought an action against him for the amount of the money received; and it was held that the broker had no right to retain it for a debt to him from B. the agent.

Foster v. Hoyt and Tom, 327.

3. If, however, B. had acted as the ostensible principal, C. would have been entitled to consider him as such, and to regulate his claims accordingly. Per *Kent, J. Id.*
4. The lien of an insurance broker on the policy that he effects? Cases and authorities, 329, n. (b.)

III. *When personally liable.*

1. *When he incurs a personal responsibility or makes a contract in his own name.*
5. L. as agent of G., received of R. on the 25th of March, 1796, a bill of exchange for \$601, drawn by D. in favor of R. upon F. and accepted by him, which L. promised to return to R. "on demand, or the amount thereof." The bill was received by L. from motives of friendship to R. and to recover the amount for him by obtaining a credit for it to G. against the drawer D., in an arbitration then depending between D. and G. The arbitrators allowed the bill as an item in the account of G. against D. and made an award against G. which was substantially performed by both parties; L. as the agent of G., paying the amount found against the latter to D., and promising him to pay the amount of the bill to R. It appeared that at the time L. received the bill a suit was depending on it against the acceptor F., that interlocutory judgment was obtained in that suit in April term, 1796, and a writ of inquiry was noticed from time to time, but could not be executed in consequence of a failure upon the part of L. to procure the bill so that it could be produced on the execution of such writ. After the last application for the bill in July, 1797, the bail of F., who had previously removed to South Carolina, informed R. that he had failed and could not pay this debt. Afterward, in August following, the bill was tendered by L. to R., who refused to accept it. It did not appear that L. at any time informed R. that the bill had been allowed to G. by the arbitrators, or that the award had been fulfilled by D., but merely that he told R. that it was still in the hands of the arbitrators.

In an action of assumpsit by R. against L. on his agreement to return the bill on demand or the amount thereof; *held*, that the special undertaking of L. was *personal*, and he was, therefore, bound by it.

Rutgers et al. v. Lucet, 92.

Cases and authorities, 96, n. (a.) 4.

See BAILMENT.

2. *Whenever he does an act without authority from his principal*

Cases and authorities, 96, n. (a.) 1.

3. *When Agency is not revealed.*

Cases and authorities, 96, n. (a.) 2.

4. *When principal resides in a foreign country.*

Cases and authorities, 96, n. (a.) 3.

5. *In special cases.*

Cases and authorities, 96, n. (a.) 5.

ALIEN.

I. *Who is.*

II. *Right of Expatriation.*

I. *Who is.*

1. K., a native of Ireland, removed to New York in 1760, where he continued to reside until his death, in 1798. He left a widow in Ireland at the time he removed from that country, having been married in 1750. His wife was a native of Ireland, having never left the country, but continued a subject of the king of Great Britain. It was held, that the wife of K. being an *alien*, could recover dower of those lands only, of which K. was seised before the American revolution, or the 4th of July, 1776, and not of those he acquired after that period. *Kelly v. Harrison*, 29.

2. Who is an alien, considered *ante* and *postnati*, and their rights, 32, n. (a.)

3. Where A. a British subject became a naturalized citizen, and took the oaths of abjuration and allegiance to this state in 1784; and in 1795, took an oath of allegiance to the king of Spain, and was appointed a consul by the Spanish king, and continued to reside in New York, without ever changing his *domicil*; it was held, that he was still to be considered as an American citizen, and not an *alien* or Spanish subject.

Fisk v. Stoughton, 407.

II. *Right of Expatriation.*

See 408, n. (a.)

AMENDMENT OF DECLARATION.

- I. *When made.*
- II. *In what cases allowed.*
- III. *Index to n. (b.) p. 220.*

I. *When made.*

- 1. An amendment may be made after a plea in abatement.

Shute v. Davis et al. 336.

II. *In what cases allowed.*

- 2. An amendment by adding the name of another defendant, against whom a separate suit was brought for the same demand, was refused after a plea in abatement. *Shute v. Davis et al. 336.*

Cases and authorities, 220, n. (b.)

- 3. A declaration was allowed to be amended by increasing the damages in the conclusion, on payment of costs. *Begart v. McDonald, 219.*

Cases and authorities, 220, n. (b.)

III. *Index to n. (b.) p. 220.*

- 4. That courts have a discretionary power to grant amendments, in some cases, however controlled by statute, cases, p. 220, (220,) 1.
- 5. Generally as to the right, § 1, p. (220,) 1, 2, 3, 4, 5.
- 6. Generally as to the statutes of amendment, § 2, p. (220,) 5, 6.
- 7. New cause of action not permitted, § 3, p. (220,) 6, 7, 8, 9, 10, 11.
- 8. Change of venue, § 3, p. (220,) 11, 12.
- 9. Change of the name or character of the party, § 3, p. (220,) 12.
- 10. Change of the thing demanded, § 3, p. (220,) 12.
- 11. At what time the declaration may be amended, § 4.
 - a. Before plea, p. (220,) 12.
 - b. After plea or demurrer, p. (220,) 13.
 - c. After notice of trial, p. (220,) 13, 14.
 - d. After the trial or verdict, p. (220,) 14, 15, 16.
 - e. After the judgment, p. (220,) 16.
- 12. Effect of amendment upon the rights of the opposite party, § 5, p. (220,) 16, 17, 18.

AMENDMENT OF VERDICT.

See VERDICT.

APPORTIONMENT.

See RENT.

ARREST OF JUDGMENT.

See PRACTICE, IX.

ASSIGNMENT.

I. *Protection of Rights of Assignees by Courts of Law.*II. *Assignment of Property subject to Lien.*I. *Protection of Rights of Assignees by Courts of Law.*

1. Courts of law will take notice of and protect the rights of assignees.

Wardell v. Eden, 121.

Cases and authorities, 121, n. (c.) : 258, n. (a.)

2. Where the plaintiff after he had assigned a judgment to a third person, and given notice to the defendant of such assignment, entered up satisfaction on the record, the court on motion, ordered the entry of satisfaction to be vacated. *Wardell v. Eden*, 121 ; *Wardell v. Eden*, 258.

Cases and authorities, 258, n. (a.)

II. *Assignment of Property subject to Lien.*

3. A. and B. partners in trade, having dissolved their partnership, B. took the property, and engaged to pay off all the debts due by the partnership, among which was a judgment against A. and B. at the suit of C. B. having become insolvent, C. threatened to take out execution against A. who paid the amount of the judgment, and C. agreed that A. might have the benefit of the judgment, to recover the amount out of the property of B. in the name of C. A. sued out execution against the land of B., which was bound by the judgment ; B. assigned all his property to D. and others, for the benefit of his creditors, and it was held that A. was to be considered merely as a surety of B., and entitled to an equitable lien on the property of B., and that D. and others, to whom it was assigned, took it, subject to such equitable lien. *Waddington v. Vredenberg*, 227.
4. Of the right of subrogation, (231,) 1-8.

ASSUMPSIT.

I. *Consideration.*II. *Pleading.*III. *Evidence.*I. *Consideration.*

1. Where A. directed O. his servant, to enter a certain piece of meadow which he said belonged to him, but which in fact belonged to M., and promised to save O. harmless, the promise was held to be an original undertak-

ing and not necessary to be in writing, and that the act of O. in obeying A.'s command was lawful and a sufficient consideration for the promise of indemnity. *Allaire v. Ouland*, 52.

Cases, 56, n. (a.)

II. *See Pleading.*

III. *See Evidence.*

ATTAINDER.

I. *Effect of.*

II. *Proceedings in cases of.*

I. *Effect of.*

1. Where a person was convicted by the act of forfeiture and attainder, passed the 22d October, 1779, of adhering to the enemies of the state and all his property, real and personal, declared to be forfeited, it was held, that he could not, after his return to the state in 1791, maintain an action for rent which had accrued prior to the 20th October, 1799. *Sleight v. Kane*, 236.
2. Nor could he set off the rent against the demand of the plaintiff, in an action against him. *Id.*

II. *Proceedings in cases of.*

3. Where a person, whose real name was Joshua Temple De St. Croix was convicted and attainted under the act of the 22d October, 1779, by the name of Joshua De St. Croix, it was held, that the proceedings under the act were to be governed by the rules in cases of attainder, and not by the ordinary course of judicial proceedings; that the conviction in the present case contained an imperfect or incomplete description of the person, which might be supplied and explained by parol proof; and that the identity of the person was a matter of fact, to be ascertained by a jury.

Jackson ex dem. St. Croix v. Sands, 267.

4. *Aliter*, if the description of the person be false, or repugnant to the truth. *Id.*

ATTORNEY.

I. *Privilege.*

II. *Service of Papers on.*

I. *Privilege.*

1. An attorney of this court who had ceased to practice for a year, and had entered the army of the United States, was held to have lost his privilege.

Brooks v. Patterson, 102.

Cases and authorities, 103, n. (a.)

II. *Service of Papers on.*

2. Where an attorney is employed, notice must be served on him, not on the party. *Wardell v. Eden*, 121.

Authorities, 121 n. (a.)

See PRACTICE.

AVERMENT.

See PLEADING.

AUDITA QUERELA.

- I. *When it may be sued out.*
- II. *Of the nature of the remedy.*
- III. *Of the Practice.*
- IV. *Index to note (b,) p. 262.*

I. *When it may be sued out.*

1. An *audita querela quia timet*, cannot be sued out by a purchaser of land, until after execution has been issued.

Waddington v. Vredenberg, 227.

II. *Of the nature of the remedy.*

2. A. and B. partners in trade, having dissolved their partnership, B. took the property, and engaged to pay off all the debts due by the partnership, among which was a judgment against A. and B. at the suit of C. B. having become insolvent, C. threatened to take out execution against A. who paid the amount of the judgment, and C. agreed that A. might have the benefit of the judgment, to recover the amount out of the property of B. in the name of C. A. sued out execution against the land of B., which was bound by the judgment; B. assigned all his property to D. and others, for the benefit of his creditors, and it was held that A. was to be considered merely as a surety of B., and entitled to an equitable lien on the property of B., and that D. and others, to whom it was assigned, took it, subject to such equitable lien; and the court could not, therefore, relieve them by an *audita querela*. *Waddington v. Vredenberg*, 227.
3. Where the defendant alleged payment to the plaintiff, made by him, on a judgment which had been assigned to a third person, the court, on motion for that purpose, refused to award an issue, to try the truth and validity of the payment; but left the party to his remedy by *audita querela*, as the time when the defendant received notice of the assignment was contested; though the court might, if they had thought proper, have stayed execution on the judgment, until it was revived by *scire facias*, or by an action of debt, when the plaintiff might plead the payments. *Wardell v. Eden*, 258.

III. *Of the Practice.*

4. The writ must be allowed in open court, but is not itself a *supersedeas*; and where the party is not in actual custody, or sues *quia timet*, a *venire facias* is the proper process. *Waddington v. Vredenberg*, 227.

IV. *Index to note (b,) p. 262.*

5. Definition of *audita querela*, 262, n. (b.)
6. Nature of the suit. *Id.*
7. General object of the remedy. *Id.*
8. Lies for injustice of the party not of the court. *Id.*
9. Will not lie if there be another remedy. *Id.*
10. Nor for matters that could have been pleaded. *Id.*
11. Antiquity of *audita querela*. *Id.*
12. Relief on motion a substitute for *audita querela* in certain cases. *Id.*
13. How allowed. *Id.*

BAIL.

I. *Obligation of.*

II. *When fixed.*

III. *When discharged.*

1. *Where the principal discharged under the Bankrupt Act before bail fixed.*
2. *Where principal discharged from imprisonment under the Bankrupt Act.*
3. *Where bail have been falsely personated.*

IV. *Proceedings against.*

1. *Laches of bail.*
2. *Peculiar indulgence to.*
3. *Scire facias against—pleading and evidence in.*

V. *Costs in actions against.*

1. *Mode of collection where original suit settled, but suit on bail bond pending.*
2. *Mode of collection when principal is surrendered.*

I. *Obligation of.*

1. Bail to the sheriff are responsible only for the principal and interest due on the bond in the original suit, and not for any matters *dehors* the condition for which the penalty is claimed as security.

Treadwell v. McKeel and others, 340.

Authorities, 342, n. (a.)

II. *When fixed.*

2. And bail are not considered as fixed, until after eight days in full term

after the return of process against them, or within the time allowed for the surrender of the principal. *Kane and Kane v. Ingraham*, 403.
Cases and authorities, 405, n. (a,) (b.)

III. *When discharged.*

1. *Where principal discharged under the Bankrupt Act before bail fixed.*
3. Where the principal in a cause had obtained his certificate of discharge under the bankrupt law of the United States before the bail had become fixed, the court ordered an *exoneretur* to be entered on the bail-piece.
Kane and Kane v. Ingraham, 403.
Cases and authorities, 405, n. (a) and (b.)

2. *Where principal discharged from imprisonment under the Bankrupt Act.*
4. Where the principal, against whom a commission of bankruptcy had issued, was arrested on a *ca. sa.* and discharged, it was held, that the bail was also discharged, and that there was no necessity to enter an *exoneretur* on the bail-piece. *Milner and others v. Green*, 283.
Cases and authorities, 284, n. (a) and (b.)

5. Whether the court has power to discharge a defendant from execution, on the ground that a commission of bankruptcy had issued against him? *Quere. Id.*

3. *Where bail have been falsely personated.*

6. Where bail are personated, the court will, in their discretion, on motion, order a *vacatur* of the bail. *Renoard v. Noble*, 293.
Authorities, 296, n. (a.)
7. But if there has been a felonious personating of bail, they will stay any order for relief, until the party personated has prosecuted the felon. *Per Kent, J. Id.*

IV. *Proceedings against Bail.*

1. *Laches of Bail.*

8. Where the proceedings against bail were irregular, but they suffered two terms to elapse, after a knowledge of the irregularity, before they applied to set them aside, it was held too late. *Jones v. Dunning and Doe*, 74.
Cases and authorities, 74, n. (a.)

2. *Peculiar indulgence to.*

9. If a party wants time to plead, he must apply to a judge for that purpose. In an application to set aside a default for not pleading, bail are not entitled to any peculiar indulgence. *Graham v. Lansing and Doe*, 107.

3. *Scire facias against—pleading and evidence in.*

10. In an action of *scire facias* against bail, the defendant pleaded that another person of the same name and description became bail, and traversed that he was the person named in the bail-piece. The name of Elnathan Noble was inserted in the bail-piece, but it was proved that Stephen Norton was the person who intended to be bail, and who, in fact, appeared before the judge who took and signed the acknowledgment on the bail-piece. It was

held, that the plea was good ; that the evidence was admissible, and sufficient, on the issue joined between the parties, as to the identity of the person. *Renoard v. Noble*, 293.

Authorities, 296, n. (a.)

See *Infra*, pl. 12.

V. *Costs in actions against.*

1. *Mode of collection where original suit settled, but suit on bail bond pending.*

11. Where a party agreed to stay proceedings in a bail-bond suit, on payment of costs, the original suit having been settled, and the defendant neglecting to pay the costs, the plaintiff proceeded in the bail-bond suit, the court refused to set aside the proceedings, as the plaintiff had no other way to obtain his costs. *Campbell v. Grove*, 105.

Cases and authorities, 106, n. (a.)

2. *Mode of collection when principal is surrendered.*

12. If the principal be surrendered pending the suit by *scire facias* against the bail, an *exoneretur* will not be allowed, until the costs of the proceedings against bail are paid. *Parker v. Tomlinson*, 220-18.

Authorities, 220-18, n. (a.)

BAILMENT.

I. *Agreement to undertake a trust in futuro.*

II. *Degree of diligence required of Bailee.*

1. *Where the performance of an agreement without compensation has been entered upon.*

2. *Generally.*

I. *Agreement to undertake a trust in futuro.*

1. A mere agreement to undertake a trust in *futuro* without compensation is not obligatory ; but when once undertaken, and the trust actually entered upon, the bailee is bound to perform it according to the terms of his agreement. *Rutgers et al. v. Lucet*, 92.

Common and civil law cases and authorities, 95, n. (a.)

II. *Degree of diligence required of Bailee.*

1. *Where the performance of an agreement without compensation has been entered upon.*

2. L. as agent of G., received of R. on the 25th of March, 1796, a bill of exchange for \$601, drawn by D. in favor of R. upon F. and accepted by him, which L. promised to return to R. "on demand, or the amount thereof." The bill was received by L. from motives of friendship to R. and to recover the amount for him by obtaining a credit for it to G. against the drawer D., in an arbitration then depending between D. and G. The arbitrators allowed the bill as an item in the account of G. against D. and made an award against G. which was substantially performed by both parties ; L. as the

agent of G., paying the amount found against the latter to D., and promising him to pay the amount of the bill to R. It appeared that at the time L. received the bill a suit was depending on it against the acceptor F., that interlocutory judgment was obtained in that suit in April term, 1796, and a writ of inquiry was noticed from time to time, but could not be executed in consequence of a failure upon the part of L. to procure the bill so that it could be produced on the execution of such writ. After the last application for the bill in July, 1797, the bail of F., who had previously removed to South Carolina, informed R. that he had failed and could not pay this debt. Afterwards, in August following, the bill was tendered by L. to R., who refused to accept it. It did not appear that L. at any time informed R. that the bill had been allowed to G. by the arbitrators, or that the award had been fulfilled by D., but merely that he told R. that it was still in the hands of the arbitrators.

In an action of assumpsit by R. against L. on his agreement to return the bill on demand or the amount thereof: *held*, that the special undertaking of L. although gratuitous, was binding upon him, inasmuch as he had actually entered upon the performance of it. *Rutgers et al. v. Lucet*, 92.

Cases and authorities, 95, n. (a.)

See *Supra*, I.

2. Generally.

3. Supposing the bailment to R. to have been *general*, and that he was subject to no special agreement to return the bill or pay the amount, he was still bound to use a due diligence and attention adequate to the trust reposed in him, to perform his engagement with good faith, and neither do nor omit anything other than the nature of the trust required.

Rutgers et al. v. Lucet, 92.

Authorities, 95, n. (a.)

See CONSIGNOR AND CONSIGNEE.

BANKRUPT.

I. *Power of the Court to discharge from Execution.*

II. *Effect of discharge of, upon the liability of Bail.*

I. *Power of the Court to discharge from Execution.*

1. Whether the court has power to discharge a defendant from execution, on the ground that a commission of bankruptcy had issued against him? *Quere. Milner et al. v. Greene*, 283.
2. In England it has been decided that the courts will not exercise such a power, 284, n. (a.)

II. *Effect of the discharge of, upon the liability of Bail.*

3. Where the principal against whom a commission of bankruptcy had issued, was arrested on a *ca. sa.* and discharged, it was held, that the bail was also

discharged, and that there was no necessity to enter an *exoneretur* on the bail-piece. *Milner et al. v. Greene*, 283.

Cases and authorities, 284, n. (b.)

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. *Liability of Drawer.*

II. *Notice of non-acceptance or non-payment.*

1. *When given by agent.*

(a) *To the remitter of the bill.*

(b) *When agent nominal holder, what time he has to give notice of dishonor.*

(c) *The same, when agent is not a party to the bill.*

(d) *Notice to the drawer directly.*

2. *What will excuse.*

3. *Form of.*

4. *Effect of failure to give.*

III. *When payment of a precedent debt.*

I. *Liability of drawer.*

1. A drawer of a bill which has been accepted, is not responsible, until after a default of the acceptor, and the holder must use due diligence to demand payment of the acceptor before he can resort to the drawer.

Munroe and Roe v. Easton, 75.

Authorities, 77, n. (a.)

See *Infra*, II.

II. *Notice of non-acceptance or non-payment.*

1. *When given by agent.*

(a) *To the remitter of the bill.*

2. Where an agent receives a bill in order to obtain payment, he must send notice of non-acceptance and non-payment, with the protests to the remitter, whose duty it is to give immediate notice to the drawer.

Tunno and Cox v. Lague, 1.

(b) *When agent nominal holder, what time he has to give notice of dishonor.*

Cases and authorities, 2, n. (b.)

(c) *The same, when agent is not a party to the bill.*

Cases and authorities, 2, n. (b.)

(d) *Notice to the drawer directly.*

3. If the agent himself undertakes to give notice to the drawer, it will be sufficient, if it be given as soon, as under the circumstances of the case, it could have been received from the holder.

Tunno and Cox v. Lague, 1.

Cases and authorities, 2, n. (a) and (b.)

2. *What will excuse.*

4. The prevalence of a malignant fever in the city of New York was held a sufficient excuse for not giving notice until November of a protest of non-payment made in September. *Tunno and Cox v. Lague*, 1.
5. Cases that will excuse, as—inevitable accident, prevalence of malignant fever, state of war, adverse weather, loss of bill by robbery, &c. 2, n. (a.)

3. *Form of.*

6. There is no particular form of notice to the endorser of a note, prescribed by law. It is enough, if, under all circumstances, it was sufficient to put him on inquiry; and this is properly a question of fact for the jury to decide. *Reedy v. Seixas*, 337.
- Cases, 338, n. (a)

4. *Effect of failure to give.*

7. The endorsee of a bill of exchange, which had been accepted without demanding payment of the acceptor, or inquiring after the drawer, presented the bill, when it became due, to the payee endorser, who paid it, and charged the amount in his account against the acceptor. The payee afterwards brought an action against the drawer, for so much money paid to the use of the drawer, and offered the bill in evidence in support of the action; it was held that the drawer was not liable. *Munroe et al. v. Easton*, 75.

Cases and authorities, 77, n. (a.)

See *Supra*, I.

III. *When payment of a precedent debt.*

8. A bill of exchange given for a precedent debt is not payment, unless expressly agreed so to be by the parties. *Murray v. Gouverneur and Kemble*, Cases, 441, n. (b.) 438.

BILL OF LADING.

See CONSIGNOR AND CONSIGNEE.

BILL OF DISCOVERY.

See CHANCERY, I.

BLOCKADE.

1. Defined, 191, n. (b.)
2. What force required to make effective. *Id.*
3. How broken up. *Id.*
4. How violated—*animus*. *Id.*
5. Presumption of knowledge of. *Id.*
6. 1. From lapse of time and general knowledge. *Id.* 1, 3.
7. 2. From residence in blockaded port. *Id.* 2.

BOND.

See PENALTY.

BOTTOMRY.

- I. *Construction of Bond.*
- II. *Insurance on Bottomry Interest.*
- III. *Analytical Index to note (b,) p. (253,) 1.*

I. *Construction of Bond.*

1. Where a bottomry bond executed by the master, after the usual recital and clause hypothecating the vessel for the payment of the money advanced, contained the following clause: "And for the better performance of all the covenants and agreements herein contained, I, the said N. B." (the obligor) "for the consideration aforesaid, do *grant, bargain and sell* the said ship John, and premises to the said G. R." (the obligee) "his executors," &c. with the usual proviso, that on payment, &c., the whole was to be void: it was held, that these words did not destroy the character or operation of the bond. *Robertson and Brown v. United Insurance Company*, 250.

II. *Insurance on Bottomry Interest.*

2. An insurance on the vessel will not cover a bottomry interest, unless it is expressly mentioned in the policy.
Robertson and Brown v. United Ins. Co. 250.

III. *Analytical Index to note (b.)*

3. Definition and nature of the contract, (253,) 1, 2, 3, 4, 5, 6, 7.
 - (a) Comparison between bottomry and insurance, (253,) 1.
 - (b) Civil law, *contractus nauticus seu trajectitiæ pecuniæ*, (253,) 1, 2.
 - (c) Objects and necessity of bottomry, (253,) 2, 3, 4, 5, 6.
 - (d) Who may make a bottomry bond, under what circumstances, and what renders it void—and when it will be upheld against subsequent *bona fide* purchasers. *Id.*
 - (e) Of the prior lien of seamen to that of the holder of a bottomry bond. *Id.*
 - (f) Of the risks assumed by the lender—civil law, (253,) 6, 1, 2.
 - (g) Of the construction of the contract—common law rule supposed to differ from the French law—change of the contract by the agreement of the parties—Pardessus' opinion, (253,) 6.
4. The risk.
 - (a) Must be incurred—civil law rule, (253,) 7.
 - (b) But where principal is put at hazard, the lender is entitled to his profit—foreign law, (253,) 7, 8.
5. The interest.
 - (a) Only limited by agreement of parties—civil law, (253,) 8.
 - (b) Extraordinary interest ceases on arrival of vessel in port—civil law. *Id.*
 - (c) Whether interest chargeable on the profits of the loan—foreign law. *Id.*

6. As to the liability of the lender to average and salvage—foreign law and law of Louisiana, (253,) 8, 9.
7. Insurance of lender's and borrower's interest—foreign law, (253,) 9, 10.

BROKER.

Insurance, Lien of.

1. A. the master of a vessel, directed B. as his agent, to get his commissions as master insured, and C. the broker, had the policy effected in the name of B. on the commissions of the master, who was named in the policy, and the agency of B. was known to the broker. A total loss having been recovered by the broker, A. brought an action against him for the amount of the money received; and it was held that the broker had no right to retain it for a debt to him from B. the agent.

Foster v. Hoyt and Tom, 327.

2. If, however, B. had acted as the ostensible principal, C. would have been entitled to consider him as such, and to regulate his claims accordingly. Per *Kent, J. Id.*

Cases and authorities, 329, n. (b)

BROTHERTOWN INDIANS.

The Brothertown Indians are subject to the civil and criminal jurisdiction of this state. *Case of George Peters, 344.*

CERTIORARI.

See JUSTICES' COURT.

CHANCERY.

I. *Jurisdiction.*

1. *In cases of Discovery.*
2. *When it will be retained.*

II. *Limitation of demands in.*III. *Relief of parties in pari delicto.*IV. *Injunction to stay suit at Law.*I. *Jurisdiction.*

1. *In cases of Discovery.*

1. The court of chancery will not enforce a discovery unless the party calling therefor will state some material matter of fact which he wishes to substantiate by the confession of the other party. Per *Kent, J.*

Newkirk et al. v. Willett, 413.

Cases and authorities, 417, n. (b.)

See *Infra*, IV.

2. *When it will be retained.*

2. Where a court of chancery has acquired cognizance of a suit for the purpose of discovery or an injunction, it may, if in full possession of the merits, retain the suit, in order to do complete justice between the parties, and to prevent useless litigation and expense.

Armstrong and Barnwall v. Gilchrist, 424.

Cases and authorities, 432, n. (b.)

II. *Limitation of demands in.*

3. Where A. B. and C. entered into partnership in trade, in 1767, and continued business until May, 1774, when B. died, and the partnership was thereby dissolved, and C. afterwards died in 1782, and A. in 1788, without the partnership accounts having been settled; and in 1794, the representatives of A. filed a bill in chancery against the representatives of the other partners, for an examination and settlement of accounts, and for the payment of a balance claimed; the court dismissed the bill on account of the lapse of time and the death of the parties, considering it as a stale demand.

Ray, Lansing et al. v. Bogart et al. 432.

Cases and authorities, 438, n. (a)

III. *Relief of parties in pari delicto.*

4. A. claiming title under the Connecticut Susquehannah Company to land situate in the state of Pennsylvania, and claimed by that state, sold the land to B. who gave him notes for the purchase money, part of which was paid; and A. executed to B. a *quit-claim* deed for the land. B. afterwards filed his bill in chancery, praying that A. might be perpetually enjoined from assigning the notes, or proceeding at law to recover the amount; and that the money paid might be refunded; it was held, that the sale was *maintenance*, in selling a *pretended* title, and that both parties being *in pari delicto*, a court of equity would not relieve either; and the bill was, therefore, dismissed. *Woodworth and Rathbun v. Jones and others*, 417.

Cases and authorities, 423, n. (b.)

IV. *Injunction to stay suit at Law.*

5. The executors of S. filed a bill in chancery against W. setting forth that W. had commenced a suit at law against them for a debt pretended to be due from the testator, of which they had no knowledge, and which they had strong ground to believe was unjust, and that they could not safely proceed to trial without a discovery from W. of all the facts relative to the origin and state of such pretended debt, and praying for an answer and an injunction. An injunction was allowed by one of the masters of the court of chancery, which, afterwards, was ordered, by the chancellor, to be dissolved; and on an appeal from this order, it was held that the bill did not contain sufficient equity to entitle the plaintiff to a discovery, and that the order for the injunction was properly dissolved.

Newkirk and others v. Willett, 413.

Cases and authorities, 417, n. (b.)

CITIZENSHIP.

Where A a British subject became a naturalized citizen, and took the oaths of abjuration and allegiance to this state in 1784; and in 1795, took an oath of allegiance to the king of Spain, and was appointed a consul by the Spanish king, and continued to reside in New York, without ever changing his *domicil*; it was held, that he was still to be considered as an American citizen, and not an *alien* or Spanish subject.

Fish v. Stoughton, 407

See ALIEN. INSURANCE.

COEYMAN'S PATENT, BOUNDARY OF.

The south bounds of Coeyman's patent, are to be taken according to the survey made by order of the proprietors in 1749.

Jackson ex dem. Salisbury v. Huyck, 64.

COMMISSION TO EXAMINE WITNESSES.

See AFFIDAVIT, II. 1. PRACTICE, XV.

COMMISSIONERS.

How many appointed under a statute required to do an act, 348, n. (s.)

CONCEALMENT.

In marine insurance what is, and effect of, 78, n. (a); 171, n. (a.)

CONDITION PRECEDENT.

A. devised lands to the use of his wife for life, and to B. in fee, and if he died before arriving at full age, then to the surviving brothers of B. in succession, if of full age, then to the first son of his niece M. and his heirs and assigns for ever, and in default of such issue, remainder over to his own right heirs; and directed that in case his wife should die before B. or his surviving brother should be of age, then his niece M. should take possession of the lands until his heir should be of age. The wife and niece of the testator both died before B. came of age. It was held that B. had a vested interest in possession, on the death of the widow, and that the devise to the niece failed.

Where an absolute property is given, and a particular interest is given in the mean time, as until the devisee comes of age, this will not operate as a *condition* precedent, but as a description of the time when the remainder-man is to take possession. Where a precedent limitation, by any means whatever, fails, the subsequent limitation takes effect.

Jackson ex dem. Beach v. Durland, 314.

CONSIGNOR AND CONSIGNEE.

1. Where a master of a vessel signed a bill of lading to deliver four cases of goods to N. T. at Norfolk, who was a transient person, and not a resident at Norfolk, and the master, on arriving at Norfolk, inquired for N. T. and could not find him, and delivered the goods to merchants there for N. T. it was held, that the master, having acted *bona fide* and according to the usage of trade, was not, under the particular circumstances of the case, liable to the consignor on the bill of lading. *Mayell v. Potter*, 371.
2. The question whether it is the duty of a carrier independently of any special contract between the parties, or any local usage of the trade, to deliver goods at the houses of the persons to whom they are directed, considered. 374, n. (b.)
3. Cases depending upon usage. *Id.*
4. Case where the consignee cannot be found. *Id.*

CONSPIRACY.

- I. *Of the Offence.*
- II. *Of the Verdict.*

I. *Of the Offence.*

1. Where three persons were engaged in a conspiracy, and one of them died before trial, and another was acquitted, it was held that the survivor might be tried and convicted. *The People v. Olcott*, 301.

II. *Of the Verdict.*

2. A. and B. being indicted for a conspiracy to defraud C., the jury found a verdict that there was an agreement between A. and B. to obtain money from C., but with an intent to return it again; this was held not to be a verdict of acquittal, or a verdict on which any judgment could be given. *The People v. Olcott*, 301.

See INDICTMENT. •

CONTEMPT.

Bringing suit in the name of another.

Where a person brought a suit in the name of another, without his privity or consent, it was held to be a contempt of the court, and the nominal plaintiff being nonsuited, an attachment was granted against the person who brought the suit, for the costs. *Butterworth v. Stagg*, 291.

COSTS.

I. *Plaintiffs.*

1. *In Debt.*

(a) *On Bond conditioned for the performance of Covenant.*

(b) *On single Bill.*

2. *In Actions by Executors.*

II. *Defendants.*

1. *Against Attorney.*

2. *Against Executor Plaintiff.*

III. *Security for.*

IV. *When they become a debt under the Insolvent Act.*

I. *Plaintiffs.*

1. *In Debt.*

(a) *On Bond conditioned for performance of Covenants.*

1. In an action of debt on a bond conditioned for the performance of covenants, the plaintiff must assign *breaches*, and have the damages assessed, and may then enter judgment for the penalty *pro forma*, and issue execution for the damages and costs; and if the damages are assessed at *six cents*, he will be entitled to nominal damages for the detention of his debt, and may enter up judgment for the penalty so as to recover full costs.

Hodges v. Suffelt, 406.

Cases and authorities, 407, n. (a.)

(b) *On single Bill.*

2. Where the plaintiff recovers 250 dollars of debt, and damages for the detention, on a single bill, he is entitled to the full costs of this court.

Clapp v. Reynolds, 409.

Authorities, 409, n. (a.)

2. *In Actions by Executors.*

3. Where executors sued in the supreme court, and recovered less than fifty dollars, it was held, that they were not entitled to recover costs, nor liable to pay costs to the defendant. *Executors of Mahany v. Fuller*, 209.

Authorities, 211, n. (a)

II. *Defendants.*

1. *Against Attorney.*

4. Where there were two plaintiffs in a cause, one of whom resided out of the state, and the other within the state, and the plaintiff within the state died pending the suit, and the defendant obtained judgment, it was held that the attorney of the plaintiffs was not bound to pay the costs.

Jackson v. Powell, 67

Authorities, 67, n. (a.)

2. *Against Executor Plaintiff.*

See *Supra*, I. 2.

III. *Security for.*

5. The attorney is not bound to file security for costs, where one of the plaintiffs resides in the state, though he may be insolvent.

Pfister and McComb v. Gillespie, 109.

Cases and authorities, 109, n. (b.)

IV. *When they become a debt under the Insolvent Act.*

6. Where a plaintiff in a cause was nonsuited in 1799, and a judgment of nonsuit entered in January term, 1800, and the plaintiff obtained his discharge under the insolvent act in November, 1800, and the costs of the nonsuit were taxed after the discharge, it was held that the costs were not a debt until taxation, and the plaintiff was not therefore discharged from the costs.

Cone v. Whitaker, 280.

Cases and authorities, 281, n. (a.)

7. This doctrine, however, is overruled, cases, 281, n. (b.)

COURT, JUSTICE'S.

See JUSTICE'S COURT.

COURT OF GENERAL SESSIONS OF THE PEACE.

Power to discharge a Jury.

1. The court of sessions has power to discharge a jury, without the consent of the prisoner, in case of an indictment for a misdemeanor; but the power rests in sound discretion, and ought to be exercised with caution.

People v. Denton, 275.

2. Where a jury could not agree on a verdict, after being out all night, and part of a day, and the court discharged them, without the consent of the party, the discharge was held to be proper, and the prisoner was again arraigned on the indictment for the same offence. *Id.*

Cases and authorities, 276, n. (a.)

COVENANT.

I. *Action of.*

1. *Where it lies.*
2. *By whom.*
3. *Against whom.*
4. *Damages in.*

II. *Construction of.*I. *Action of.*

1. *Where it lies.*

1. Where R. granted and demised land to P. and his heirs, executors and administrators, reserving an annual rent, which P. for himself, his heirs, executors and administrators, covenanted to pay on the 1st day of May in each year, it was held, that the executors of R. could not recover rent

which accrued subsequent to the death of their testator; *aliter*, for rent due previous to the testator's death.

Executors of Van Rensselaer v. Executors of Platner, 17.

2. Where several counts or causes of action are stated, and any one of them is bad, and the damages entire, the court cannot discriminate or give judgment for the whole. So where the right of action accrues periodically, or depends on time, if the plaintiff's declaration embraces a period for which he cannot be entitled to recover, and the damages are entire, it is equally out of the power of the court to distinguish the good from the bad, or to give judgment for the whole. Per *Radcliff*, J. Unless the court have sufficient matter by which to intend that no damages were given for the period when the plaintiff had no right. Per *Kent*, J.

It seems that an action of covenant will lie against the executors of the lessee on such a covenant, though the land had passed, by act of law, into other hands. *Id.*

2. By whom.

3. For breach by a lessee in the lifetime of the lessor, the executor, or administrator. Cases and authorities, 24, n. (a.)
4. For breach by lessee after death of the lessor, the reversioner. Cases and authorities. *Id.*
5. For breach by lessee or his assignee, by grantee of the reversion, under the stat. 32 Henry VIII.; 1 Rev. Laws, 363, 364; 1 Rev. Stat. 7:9. Cases and authorities, 26, n. (a.)
6. Where an estate in fee is granted, reserving annual rent, the devisees of the grantor cannot maintain covenant against the executors of the grantee or tenant in fee, for rent in arrear.

The Devisees of Van Rensselaer v. The Executors of Platner, 24.

3. Against whom.

See *Supra*, pl. 1, 3-6.

4. Damages in.

7. Where in an action of covenant, or in any action sounding in damages, the plaintiff claims more damages than on the face of his declaration appears to be due, it will not vitiate, especially after verdict for the amount of the damages being ascertained by the jury, it is to be presumed they were assessed according to the proof. Per *Radcliff*, J.

Executors of Van Rensselaer v. Executors of Platner, 24.

See *Supra*, pl. 2.

II. Construction of.

8. Must be *ex antecedentibus et consequentibus*, 204, n. (a); 247, n. (a.)
9. Where the grantor in a deed covenanted generally, that he was well seised, &c. and had a good right to convey the premises, &c. and then added further, that he warranted the premises to the grantee and his heirs, "against all claims and demands, except the lord of the soil;" it was held, that both covenants must be taken and construed together, and that the last qualified and restrained the first. *Cole v. Hawes*, 203.

10. Cases and authorities upon the general rules of construction, 204, n. (a) ;
247, n. (a.)

See DEBTORS.

CRIMINAL LAW.

Whether an indictment will lie against one for neglecting his duties as inspector of elections? *Quere.* See opinion of *Kent*, J. in the affirmative, 277, n. (b.)

See ATTAINDER. COURT. CONSPIRACY. FORGERY.

GRANT. INDICTMENT. TITLE.

DAMAGES.

- I. *Where damages entire upon several causes of action, one of which is bad.*
- II. *Where Plaintiff claims more damages than on the face of his declaration appear to be due.*
- III. *Where matter is insensible or void.*

- I. *Where damages entire upon several causes of action, one of which is bad.*

1. Where several counts or causes of action are stated, and any one of them is bad, and the damages entire, the court cannot discriminate or give judgment for the whole. So where the right of action accrues periodically, or depends on time, if the plaintiff's declaration embraces a period for which he cannot be entitled to recover, and the damages are entire, it is equally out of the power of the court to distinguish the good from the bad, or to give judgment for the whole. *Per Radcliff, J.* Unless the court have sufficient matter by which to intend that no damages were given for the period when the plaintiff had no right. *Per Kent, J.*

Executors of Van Rensselaer v. Executors of Platner, 17.

- II. *Where Plaintiff claims more damages than on the face of his declaration appear to be due.*

2. Where in an action of covenant, or in any action sounding in damages, the plaintiff claims more damages than on the face of the declaration appears to be due, it will not vitiate, especially after verdict for the amount of the damages being ascertained by the jury, it is to be presumed they were assessed according to the proof. *Per Radcliff, J.*

Executors of Van Rensselaer v. Executors of Platner, 17:

- III. *Where matter is insensible or void.*

3. Where matter is insensible or void, and not of the *gist* of the action, the court will intend that no damages were given for it, 22, n. (a.)

See JUDGMENT. PRACTICE, XIX.

DEATH, CIVIL.

Where the defendant in a cause is sentenced to the state prison for life, he is considered as *civilly dead*, and the suit is abated.

Graham v. Adams and Adams, 408.

Cases and authorities, 408, n. (b.)

DEBT.

In an action brought by A. against an executor for a legacy, the defendant offered in evidence an account, and certain bonds which had been paid and cancelled by the testator, on which there was an endorsement by the testator, that by agreement between A. and B. they were to be charged to the account of A. and the bonds were for that reason cancelled. The endorsement was prior to the date of the will. It was held, that the account, and endorsement made on the bonds, were not sufficient evidence to support the debt set up against A. by the executor.

Rickets and wife v. Livingston, 97.

DEBTORS.

I. *Absent or Absconding.*

1. *Liability of Trustees of, generally.*
2. *Liability of Trustees of, to the Debtor.*
3. *Liability of Trustees of, to third persons.*

II. *Insolvent.*I. *Absent or Absconding.*1. *Liability of Trustees of, generally.*

1. Trustees and persons acting in *auter droit*, are not responsible, unless there be fraud or an express warranty.

Murray v. The Trustees of the Ringwood Company, 278.

2. *Liability of Trustees of, to the Debtor.*

2. The trustees of an absent or absconding debtor, may be compelled to account on the motion of the debtor, as well as of the creditors.

In the matter of Cascaden, 107.

3. Trustees agents of all parties, 107, n. (c.)

3. *Liability of Trustees of, to third persons.*

4. Where the trustees of an absconding debtor, appointed under the act, sold his lands, and gave a deed conveying all the debtor's right and title, and the purchaser was evicted of a part of the land, it was held, that the trustees were not liable to refund any part of the purchase money.

Murray v. The Trustees of the Ringwood Company, 278.

See *Supra*, pl. 3.

II. *Insolvent.*

5. Where a plaintiff in a cause was nonsuited in 1799, and a judgment of nonsuit entered in January term, 1800, and the plaintiff obtained his discharge under the insolvent act in November, 1800, and the costs of the nonsuit were taxed after the discharge, it was held that the costs were not a debt until taxation, and the plaintiff was not therefore discharged from the costs.

Cone v. Whitaker, 280.

But see *contra* cases, 281, n. (b); also cases and authorities, 281, n. (a.)

DEBT ON BOND.

See PRACTICE, XIX.

DEED.

See DEBTORS. COVENANT. GRANT. LIMITATION.
TITLE.

DEVISE.

I. *Construction of.*II. *Proof of.*I. *Construction of.*

1. A. devised lands to the use of his wife for life, and to B. in fee, and if he died before arriving at full age, then to the surviving brothers of B. in succession, if of full age, then to the first son of his niece M. and his heirs and assigns for ever, and in default of such issue, remainder over to his own right heirs; and directed that in case his wife should die before B. or his surviving brother should be of age, then his niece M. should take possession of the lands until his heir should be of age. The wife and niece of the testator both died before B. came of age. It was held that B. had a vested interest in possession, on the death of the widow, and that the devise to the niece failed. *Jackson ex dem. Beach v. Durland*, 314.
2. Where the whole property is devised with a particular interest given out of it, it operates by way of exception. *Id.*
3. Where an absolute property is given, and a particular interest is given in the mean time, as until the devisee comes of age, this will not operate as a condition precedent, but as a description of the time when the remainder-man is to take possession. *Id.*
4. Where a precedent limitation, by any means whatever, fails, the subsequent limitation takes effect. *Id.*

II. *Proof of.*

5. Where a husband is witness to a will containing a devise to his wife, such devise is void, and the husband is a competent witness.

Jackson ex dem. Beach v. Durland, 314.

See LIMITATION.

DEVISEES.

Where an estate in fee is granted, reserving annual rent, the *devisees* of the grantor cannot maintain covenant against the executors of the grantee or tenant in fee, for rent in arrear.

The Devisees of Van Rensselaer v. The Executors of Platner, 24.

DISCOVERY.

See CHANCERY, I. 1.

DOMICIL.

Of married women and minors, 35, n. (a.)

See INSURANCE, XII. 2.

DOWER.

Of Lands of antenatus.

K., a native of Ireland, removed to New York in 1760, where he continued to reside until his death, in 1798. He left a widow in Ireland at the time he removed from that country, having been married in 1750. His wife was a native of Ireland, having never left the country, but continued a subject of the king of Great Britain. It was held, that the wife of K. being an *alien*, could recover dower of those lands only, of which K. was seised before the American revolution, or the 4th of July, 1776, and not of those he acquired after that period. *Kelly v. Harrison*, 29.

EJECTMENT.

I. *Title required to maintain.*

II. *Evidence.*

1. *For Plaintiff—agreement for Lease.*

2. *For Defendant—title out of Plaintiff.*

III. *Practice in.*

I. *Title required to maintain.*

1. An equitable title cannot prevail in ejectment, against the legal estate, especially if such equitable estate be dubious.

Jackson ex dem. Potter v. Sisson, 321.

Cases and authorities, 326, n. (a.)

II. *Evidence.*1. *For Plaintiff—agreement for Lease.*

2. Evidence of an agreement for a lease between the lessor in ejectment, and the person in possession, is not sufficient to enable the plaintiff to recover the possession, when there is no proof that any lease was ever executed, or rent paid, and the tenant claimed to hold adversely.

Jackson ex dem. Southampton v. Cooly, 223.

Authorities, 224, n. (b.)

2. *For Defendant—title out of Plaintiff.*

3. Where A. who had been many years in possession of land under B., the supposed proprietor, applied afterwards to C. as the real owner, to purchase, and requested to be considered as tenant; in an action of ejectment by C. against A. it was held, that A. might show that he made the application under a mistake, and prove a title out of C. though he could not set up an adverse possession of twenty years.

Jackson ex dem. Viely and Clark v. Cuerden, 353.

Authorities, 355, n. (a.)

III. *Practice in.*

4. In ejectment, signing the consent rules, delivering a new declaration, putting in common bail and filing a plea are all simultaneous acts. And if the tenant neglects to file the plea *instantly*, default may be entered against the casual ejector. *Jackson ex dem. Quackenboss v. Woodward*, 110.

Cases and authorities, 110, n. (d.)

5. In ejectment, the tenant must plead at the time he signs the consent rule.

Jackson ex dem. Van Alen v. Vischer, 106.

Authorities, 107, n. (a.)

6. A default for want of a plea, must be entered against the casual ejector, not the tenant. *Jackson ex dem. Van Alen v. Vischer*, 106.

Authorities, 107, n. (a.)

EQUITY.

See CHANCERY.

ERROR.

Where the plaintiffs, who were administrators in a cause in the court of common pleas, recovered less than twenty-five dollars damages, and that court gave judgment for the damages, but not for the costs, this court refused to grant a *mandamus* to compel them to give judgment for the costs. The proper remedy is by a writ of error. *Jansen et al. v. Davison*, 72.

Cases and authorities, 73, n. (a.); 217, n. (b.)

See MANDAMUS. PRACTICE.

ESCAPE.

1. Defined, 4, n. (a.)
2. Prisoner must be kept *in salva et arcta custodia*. *Id.*
3. Cases of escape. *Id.*
4. Cases held not to be escapes. *Id.*
5. What indulgence sheriff may give prisoner in custody on *ca. sa*. *Id.*

See SHERIFF.

ESTATE.

See ALIEN, I. 1. DEVISE.

ESTOPPEL.

If a person proceeds upon the information of another to do an act in his favor, the person in whose favor the act is to be done, is bound, at his peril to see that the information given is correct. *Faugier v. Hallett*, 233.

See EVIDENCE, V.

EVIDENCE.

- I. *Attainder*.
- II. *Debt*.
On judgment when nil debet is the issue.
- III. *Ejectment*.
- IV. *Hand-Writing*.
- V. *Judgments, Decrees and Sentences*.
- VI. *Lost Paper*.
- VII. *Presumption*.
 1. *Fraud*.
 2. *Of indebtedness*.
- VIII. *Record*.
 1. *Proof of*.
 2. *Effect of*.
- IX. *Scire facias against Bail*.

I. *Attainder*.

1. Where a person, whose real name was Joshua Temple De St. Croix was convicted and attainted under the act of the 22d October, 1779, by the name of Joshua De St. Croix, it was held, that the proceedings under the act were to be governed by the rules in cases of attainder, and not by the ordinary course of judicial proceedings; that the conviction in the present case contained an imperfect or incomplete description of the person, which

might be supplied and explained by parol proof; and that the identity of the person was a matter of fact, to be ascertained by a jury; *aliter*, if the description of the person be false, or repugnant to the truth.

Jackson ex dem. St. Croix v. Sands, 267.

II. Debt.

On judgment when nil debet is the issue.

2. In an action of debt on a judgment in the supreme court of Pennsylvania, the defendant pleaded *nil debet* and *payment*. It was held, that the plaintiff was bound to produce and prove the record of the judgment, or an exemplification thereof. *Rush v. Cobbett*, 256.

Cases and authorities, 257, n. (a.)

III. Ejectment.

3. Evidence of an agreement for a lease between the lessor in ejectment, and the person in possession, is not sufficient to enable the plaintiff to recover the possession, when there is no proof that any lease was ever executed, or rent paid, and the tenant claimed to hold adversely.

Jackson ex dem. Southampton v. Cooly, 223.

Authorities, 224, n. (b.)

IV. Hand-Writing.

4. The hand-writing of the maker or endorser of a note may be proved by witnesses from their previous knowledge of his hand-writing, derived from having seen the person write, or from authentic papers, received in the course of business; but if the witness has no previous knowledge of the hand-writing, he cannot be permitted to decide upon it, in court, from a comparison of hands. *Titford v. Knott*, 211.

Cases and authorities, 214, n. (a.)

5. The confidential clerk of the plaintiff was admitted, to prove a correspondence, by letters, between the plaintiff and defendant, who resided in London, and to testify, that from the knowledge that he had acquired from the letters of the defendant, received during this correspondence, he believed the endorsement in question to be the hand-writing of the defendant, though the witness had never seen the witness write. *Titford v. Knott*, 211.

Cases and authorities, 214, n. (a.)

6. Whether papers signed by the party admitted to be genuine, can be delivered to a jury to determine, by a comparison, as to the genuineness of the paper in question? *Quære. Titford v. Knott*, 211.

7. Such evidence not now admissible, cases and authorities, 214, n. (b.)

V. Judgments, Decrees and Sentences.

8. Sentences of courts of admiralty, 144, n. (c.)

Effect of, as evidence. *Id.*

9. Decrees of court of chancery, 144, n. (c.)

Effect of, as evidence. *Id.*

10. Judgments of ecclesiastical courts, 144, n. (c.)
In rem. Id.
 Grant of probate. *Id.*
 In a matrimonial suit. *Id.*
11. Sentence of college visitor, 144, n. (c.)
12. Sentence of court martial, 144, n. (c.)
13. Effect of sentences of *foreign prize* courts, in actions between assured and underwriter, 144, n. (b); 168, n. (b.)
14. Judgment only conclusive where the essential requisites and formalities of judicial tribunals in civilized countries conformed to. *Id.*
15. Judgment, how far conclusive, 168, n. (b.)
16. Jurisdiction necessary. *Id.*
17. Upon what jurisdiction may depend,
 1. The state of the *res* upon which the sentence was designed to operate. *Id.*
 2. The national character of the court. *Id.*
 3. The place where the court sits. *Id.*
 4. The manner in which the court was constituted. *Id.*
18. Case where sentence went upon particular grounds. *Id.*
19. Effect of sentence of foreign court of admiralty to falsify representation of neutral property. *Id.*
20. Sentence of foreign court of admiralty, conclusive to change the property, but only *prima facie* evidence of the facts on which the condemnation purports to be made. *Id.*
21. How far the English doctrine is adopted in America, 168, n. (b); 144, n. (b.)

VI. *Lost Paper.*

22. Parol evidence of the contents of a letter of attorney, by the person to whom it was given, is admissible, if it is proved satisfactorily, that such power has been lost [without bad faith.]
 Upon the admission of such testimony, should the trial disclose evidence or reasonable grounds of suspicion of a suppression of the instrument, of *male fides* in the person offering the testimony, or should the evidence of its existence and legal efficacy not be clear and satisfactory, it will become the duty of the judge to direct and charge the jury for the defendant. Per *Gold, Senator. Livingston v. Rogers*, 488.
 Authorities, 496, n. (b.)

VII. *Presumption.*

1. *Fraud.*

23. Where there are strong circumstances, to suspect a note has been fraudulently altered, general corroborating circumstances may be admitted in evidence to strengthen the suspicions; as that other notes drawn and endorsed by the same parties, to take up one of which the note in question was given, had been altered. *Rankin v. Blackwell*, 198.
 Cases and authorities, 200, n. (b.)

2. *Of indebtedness.*

24. In an action brought by A. against an executor for a legacy, the defendant offered in evidence an account, and certain bonds which had been paid and cancelled by the testator, on which there was an endorsement by the testator, that by agreement between A. and B. they were to be charged to the account of A. and the bonds were for that reason cancelled. The endorsement was prior to the date of the will. It was held, that the account, and endorsement made on the bonds, were not sufficient evidence to support the debt set up against A. by the executor.

Rickets and wife v. Livingston, 97.

VIII. *Record.*1. *Proof of.*

25. In an action brought on a judgment of the circuit court of the United States, for the district of Massachusetts, the production of the record, under the seal of the court, was held sufficient. *Pepoon v. Jenkins*, 119.

Cases and authorities, 119, n. (a.)

26. Proof by office copy. *Id.*

27. By examined copy. *Id.*

28. By copy authenticated by the clerk under seal of the court. *Id.*

2. *Effect of.*

29. Where A. directed O. his servant, to enter a certain piece of meadow which he said belonged to him, but which in fact belonged to M., and promised to save O. harmless; and judgment having been recovered for such entry against O. in an action afterwards brought against A. he alleged in his declaration that he was sued for such entry by M. "by a certain writ commonly called an attachment of privilege against the said O. to answer to the said M. in a plea of trespass upon land, &c." This allegation was judged to be impertinent and not necessary to be proved. *Kent, J. diss.*

But if it were necessary to prove it, it was sufficiently established by the record of recovery in the suit against O. *Kent, J. diss.*

Allaire v. Ouland, 52.

See *Supra*, I.

IX. *Scire facias against Bail.*

30. In an action of *scire facias* against bail, the defendant pleaded that another person of the same name and description became bail, and traversed that he was the person named in the bail-piece. The name of Elnathan Noble was inserted in the bail-piece, but it was proved that Stephen Norton was the person who intended to be bail, and who, in fact, appeared before the judge who took and signed the acknowledgment on the bail-piece. It was held, that the plea was good; that the evidence was admissible, and sufficient, on the issue joined between the parties, as to the identity of the person. *Renoard v. Noble*, 293.

EXCEPTION.

See DEVISE.

EXECUTORS AND ADMINISTRATORS.

- I. *Right to recover Rents due to testator or intestate.*
- II. *Liabilities of.*
 - 1. *Devastavit.*
 - 2. *On covenant of testator.*
- III. *Proceedings against.*
 - 1. *By Devises.*
 - 2. *Setting aside default.*
- IV. *Costs in actions by.*

I. *Right to recover Rents due to testator or intestate.*

- 1. Where R. granted and demised land to P. and his heirs, executors and administrators, reserving an annual rent, which P. for himself, his heirs, executors and administrators, covenanted to pay on the 1st day of May in each year, it was held, that the executors of R. could not recover rent which accrued subsequent to the death of their testator; *aliter*, for rent due previous to the testator's death.

Executors of Van Rensselaer v. Executors of Platner, 17.

Cases and authorities, 24, n. (a.)

- 2. Damages for breach of covenant after death of lessor must be recovered by reversioner, 24, n. (a.)
- 3. When rent is reserved to executors, &c. 24, n. (a.)
- 4. Generally executor or administrator has no interest in real estate of testator or intestate, 24, n. (a.)

II. *Liabilities of.*1. *Devastavit.*

- 5. A. died intestate, leaving a widow and seven children, who were all minors, in 1784, except one. A suit having been commenced in 1783, against the widow as tenant in possession, under a lease for lives, the administrator, in 1784, after advising with counsel, and with the consent of the widow, and one of the heirs, who was of age, surrendered the lease, supposing it to be forfeited, for 750 dollars, though in fact it was worth a much larger sum. As no release or conveyance was executed by the administrator, the heirs afterwards brought an action of *ejectment* in the name of the administrator, to recover the possession of the leasehold estate; and in the administrator, in 1799, executed a release of the estate, and also of the action, in consideration of the 750 dollars before received, though he then believed that the property belonged to the heirs, and was not forfeited.

In an action brought on the administration bond, alleging a *devastavit*, it was held, that the administrator was justifiable in surrendering the lease, in

1784, in the manner he did, under the circumstances ; but that, in 1799, when he was satisfied that he had acted under a mistake, he ought not to have executed a release of the estate, and of the action brought for the benefit of the heirs, but have left the lessor to resort to chancery to enforce the contract ; and, on this ground, he was chargeable with a *devastavit*, for the difference between the sum received on the surrender, and the real value of the estate. *The People v. Pleas and Clark*, 376.

Authorities, 381, n. (a.)

2. *On covenant of testator.*

6. Where R. grants and demises lands to P. and his heirs, executors and administrators, reserving an annual rent, which P. for himself, his heirs, executors and administrators, covenants to pay on the 1st day of May, in each year, *it seems* that an action of covenant will lie against the executors of the lessee on such a covenant, though the land had passed, by act of law, into other hands.

Executors of Van Rensselaer v. Executors of Platner, 17.

III. *Proceedings against.*

1. *By devisees.*

7. Where an estate in fee is granted, reserving annual rent, the *devisees* of the grantor cannot maintain covenant against the executors of the grantee or tenant in fee, for rent in arrear.

The Devisees of Van Rensselaer v. The Executors of Platner, 24.

2. *Setting aside default.*

8. Where a judgment by default was regularly obtained against an administratrix, she was allowed to come in and plead, upon showing a sufficient excuse ; but the judgment was directed to stand as security for the *assets* remaining after payment of prior judgments confessed, and for *assets quando acciderint*. *Nitchie v. Smith*, 286.

Authorities, 287, n. (a.)

IV. *Costs in actions by.*

9. Where executors sued in the supreme court, and recovered less than fifty dollars, it was held, that they were not entitled to recover costs, nor liable to pay costs to the defendant. *Executors of Mahany v. Fuller*, 209.

Authorities, 211, n. (a.)

EXTINGUISHMENT.

See SATISFACTION.

FEIGNED ISSUE.

- I. *Nature of and application for.*
 II. *Trial of question of payment of assigned judgment.*

III. *Trial of question of Usury.*IV. *Where application for, will be refused.*I. *Nature of and application for.*

1. An application for a feigned issue, is to the sound discretion of the court ; and it is awarded only for the information of the court, or where the party is otherwise without relief. *Wardell v. Eden*, 258.

II. *Trial of question of payment of assigned judgment.*

2. Where the defendant alleged payment to the plaintiff, made by him, on a judgment which had been assigned to a third person, the court, on motion for that purpose, refused to award an issue, to try the truth and validity of the payment ; but left the party to his remedy by *audita querela*, as the time when the defendant received notice of the assignment was contested ; though the court might, if they had thought proper, have stayed execution on the judgment, until it was revived by *scire facias*, or by an action of debt, when the plaintiff might plead the payments. *Wardell v. Eden*, 258.

III. *Trial of question of Usury.*

3. The proper way to try the truth of the allegation of usury, in regard to a judgment, entered upon a bond and warrant of attorney, is to retain the judgment, and award a feigned issue to try the fact.
Wardell v. Eden, 258.
4. Where there is color for the allegation that a bond on which a judgment has been entered up on a warrant of attorney is usurious, the court will award a feigned issue to try the fact. *Gilbert v. Eden*, 280.

IV. *Where application for, will be refused.*

5. Where a judgment had been assigned to a *bona fide* purchaser, and notice thereof given to the defendant, the court refused to award an issue, considering a judgment as not within the words of the statute against usury, and having reason to suspect a *collusion* between the plaintiff and the defendant, to defeat the claims of the assignee of the judgment.

Wardell v. Eden, 258.

See *Supra*, II.

FINE.

See INDICTMENT.

FORCIBLE ENTRY AND DETAINER.

- I. *Right of Landlord to be let in to defend in.*
- II. *Practice in.*

I. *Right of Landlord to be let in to defend in.*

1. The landlord may be let in to defend, in an action for a forcible entry and detainer, as well as in ejectment.

The People ex rel. Quackenboss v. Burtch, 400.

II. *Practice in.*

2. An indictment for a forcible entry and detainer before two justices, having been removed by *certiorari* to this court, the defendants were served with a notice of a rule to assign errors in twenty days, and no assignment being made, a judgment by default was entered; and the defendants afterwards filed their plea. It was held, that the rule to assign errors was a nullity, and the judgment and all subsequent proceedings were set aside for irregularity. *The People ex rel. Quackenboss v. Burtch*, 400.

Cases and authorities, 402, n. (b.)

3. How traverse to indictment in, must be made, 400, n. (a.)

See JUSTICE'S COURT.

FOREIGN LAWS.

A. residing in the state of Massachusetts, and owning lands in this state, entered into a contract in that state with B. residing in this state, for the sale of lands to him. B. gave A. his bond for the consideration money payable in four years, and also four promissory notes, payable in one, two, three and four years, for the interest on the bond, at the rate of six and a half per cent. and A. executed a bond to B. conditioned to execute to him a conveyance for the land, on payment of the bond and notes. An action was brought by A. against B. in this court, on three of the notes, to which the defendant pleaded usury.

Whether the notes were usurious? *Quære.* And whether the law of Massachusetts or of this state is to govern? *Quære.*

Van Schaick v. Edwards, 355.

FORFEITURE.

The division of an empire works no forfeiture of a right previously acquired. *Kelly v. Harrison*, 29.

FORGERY.

1. Forging the following order: "Sir, the bearer, Mr. Richardson, being our particular friend, having occasion, &c. we have requested him to call on you, desiring you to accept his draft on us, on demand for 15 dollars; your compliance will much oblige," &c. is not forging an order for the payment of money within the statute. *The People v. Thompson*, 343.

2. But see a subsequent statute, (24 sess. c. 54,) by which it is declared to be forgery. *Id.*

Cases and authorities on this question, 344, n. (a.)

FRAUD.

See EVIDENCE, VII. 1. INSURANCE, VI. 1.

FRAUDS, STATUTE OF.

Where A. directed O. his servant, to enter a certain piece of meadow which he said belonged to him, but which in fact belonged to M., and promised to save O. harmless, the promise was held to be an original undertaking and not necessary to be in writing, and that the act of B. in obeying A.'s command was lawful and a sufficient consideration for the promise of indemnity. *Allaire v. Ouland*, 52.

See 56, n. (a.)

GAOL LIBERTIES.

See JAIL LIBERTIES.

GRANT OF PRETENDED TITLE.

1. Of the general nature and punishment of the offence, 60, n. (b.)
2. The estate must be legal. *Id.*
3. Purchased from an individual. *Id.*
4. Upon a sale not judicial. *Id.*
5. The land should be held adversely. *Id.*
6. The party charged should have knowledge of the adverse holding. *Id.*

GRATUITOUS UNDERTAKING.

Whether action lies for failure to perform, 95, n. (a.)

GUARANTY.

- I. *Construction of.*
- II. *Rights of guarantor against his principal.*

I. *Construction of.*

1. Where A. by writing for a valuable consideration, guarantied the payment of a sum of money by B. to C. and B. on demand, refused to pay at the time, and C. gave notice to A. of the failure of payment, and demanded the amount of him, it was held, that the demand of payment of B. and refusal by him, and notice thereof to A. were sufficient to entitle C. to recover against A. on his guaranty, without a previous suit against B.

Bank of New York v. Livingston, 409.

Authorities, 410, n. (a.)

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II. *Rights of guarantor against his principal.*

2. Where A. gave a note to B. for stock deliverable on the 1st of May, 1792, and C. having guarantied the performance of the contract, compounded with B. in March, and took up the note, and afterwards brought his action against A. for the amount, it was held that C. had a right to settle with B. and take up the note before it was due, and that A. was bound to pay him the amount of the shares, according to their value, on the 1st of May, 1792.

Armstrong and Barnwall v. Gilchrist, 423.

See SURETY.

HOOSICK PATENT.

1. The boundaries of Hoosick patent are to be taken according to the survey and map made for the partition thereof in 1754.

Jackson ex dem. Gifford v. Sherwood, 37.

2. Cases upon the construction of this patent, 37, n. (c.)

INDICTMENT.

I. *Discharge of Jury on trial of.*

II. *Judgment on, where Court is ignorant of the circumstances.*

I. *Discharge of Jury on trial of.*

1. The court of sessions has power to discharge a jury, without the consent of the prisoner, in case of an indictment for a misdemeanor; but the power rests in sound discretion, and ought to be exercised with caution.

The People v. Denton, 275.

Authorities, 277, n. (a.)

2. Where a jury could not agree on a verdict, after being out all night, and part of a day, and the court discharged them, without the consent of the party, the discharge was held to be proper, and the prisoner was again arraigned on the indictment for the same offence.

The People v. Denton, 275.

Authorities, 277, n. (a.)

3. A. and B. were indicted for a conspiracy to defraud C. B. was acquitted, and the jury being unable to agree on a verdict whether A. was guilty or not, the court, against the consent of A. ordered a juror to be withdrawn, and the jury discharged. It was held, that the court may, in their discretion, in a criminal case, discharge a jury who are unable to agree on a verdict, and against the consent of the defendant, who may be brought to trial a second time for the same offence.

Whether the court can discharge a jury in a capital case on the ground that they cannot agree. *Que.* Per *Kent, J.* *The People v. Olcott*, 301.

4. Discharge of a jury in capital cases considered, 312, n. (c.)

II. *Judgment on, where Court is ignorant of the circumstances.*

5. Where a person had been convicted on an indictment for an assault and battery, and the attorney general moved for judgment, but showed no circumstances attending the offence, by which the court could judge of the degree of punishment which ought to be inflicted, a mere nominal fine was imposed. *The People v. Cochran*, 73.

Cases, 74, n. (a.)

INJUNCTION.

See CHANCERY, IV.

INSURANCE.

I. *Abandonment.*

1. *What will justify.*
2. *When it may be made.*
3. *Effect of.*
 - (a) *When made in ignorance of restoration.*
 - (b) *To convey title to freight earned after abandonment.*
4. *Presumption of knowledge of restoration before.*
5. *Duty of assured after.*

II. *Broker, Lien of, on Policy.*

III. *Capture.*

IV. *Concealment.*

V. *Deviation, what is.*

VI. *Loss.*

1. *Adjustment of.*
 - (a) *Form.*
 - (b) *Effect of.*
 - (c) *When opened.*
 - (d) *Effect of mistake of law in.*
 - (e) *Conditional.*
2. *Partial and total.*

VII. *Neutrality, breach of.*

VIII. *Policy.*

1. *Upon bottomry interest.*
2. *Construction of.*
 - (a) *"All articles perishable in their own nature," "skins," "hides."*
 - (b) *"Dried fish," "all other articles perishable in their own nature."*
 - (c) *"French risks excepted."*
 - (d) *"Lawful goods."*
3. *Wager.*
4. *Action on—Evidence.*

IX. *Premium.*X. *Representation.*XI. *Seaworthiness.*XII. *Warranty.*

1. *Express, what amounts to.*
2. *Construction of.*
 - (a) "*American property.*"
 - (b) "*American ship.*"
 - (c) "*Illicit,*" "*prohibited,*" or "*contraband trade.*"
3. *Implied—Seaworthiness.*
4. *Breach of.*

I. *Abandonment.*1. *What will justify.*

1. A capture by a friend, or the carrying into port of a neutral, by a belligerent for adjudication, as contradistinguished from a capture by an enemy, is equally a ground of abandonment by the insured.

Murray v. The United Insurance Company, 263.

Cases and authorities, 267, n. (a) and (b.)

2. *When it may be made.*

2. If a loss continues total, the assured may at any time abandon, but in the interim he is bound to act with good faith, and take all proper measures to recover and preserve the property insured. Per *Radcliff, J.*

Roget v. Thurston, 248.

Authorities, 250, n. (a.)

3. Upon a capture by a friend, or the carrying into port of a neutral, by a belligerent, for adjudication, (as contradistinguished from a capture by an enemy,) the insured may abandon, immediately on receiving intelligence of such capture. *Murray v. The United Insurance Company*, 263.

Cases and authorities, 267, n. (a) and (b.)

3. *Effect of.*(a) *When made in ignorance of restoration.*

4. Upon a capture by a friend, or the carrying into port of a neutral, by a belligerent, for adjudication, (as contradistinguished from a capture by an enemy,) the vessel may have been restored, at the time of the abandonment, yet if the insured had no knowledge of the fact at the time, it will not affect his right to recover.

Murray v. The United Insurance Company, 263.

Cases and authorities, 267, n. (a) and (b.)

(b) *To convey title to freight earned after abandonment.*

5. Where a ship is abandoned to the insurer who accepts the abandonment, and the voyage is afterwards performed, and freight earned, the insurer is entitled to the freight earned after the abandonment, or *pro rata*.

United Ins. Co. v. Lenox, 443.

Cases and authorities, 449, n. (a) and (b.)

4. *Presumption of knowledge of restoration before.*

6. A knowledge of the restoration of a captured vessel before abandonment may be presumed, from the lapse of time and distance between the places in reference to the ordinary course of intelligence.

Murray v. The United Insurance Company, 263.

Cases and authorities, 267, n. (a) and (b.)

5. *Duty of assured after.*

7. If a loss continues total, the assured may at any time abandon, but in the interim he is bound to act with good faith, and take all proper measures to recover and preserve the property insured. Per *Radcliff, J.*

Roget v. Thurston, 248.

Authorities, 250, n. (a.)

See *Infra*, IV. DEVIATION.

II. *Broker, Lien of, on Policy.*

8. A. the master of a vessel, directed B. as his agent, to get his commissions as master insured, and C. the broker, had the policy effected in the name of B. on the commissions of the master, who was named in the policy, and the agency of B. was known to the broker. A total loss having been recovered by the broker, A. brought an action against him for the amount of the money received; and it was held that the broker had no right to retain it for a debt to him from B. the agent.

Foster v. Hoyt and Tom, 327.

9. If, however, B. had acted as the ostensible principal, C. would have been entitled to consider him as such, and to regulate his claims accordingly. Per *Kent, J. Id.*

Cases and authorities, 329, n. (a) and (b.)

III. *Capture.*

See *Supra*, I. ABANDONMENT.

IV. *Concealment.*

10. What it is, and the effect of, 78, n. (a); 171, n. (a.)

V. *Deviation, what is.*

11. Insurance on goods at and from New York to Barracoa, with liberty to touch at one or two ports on the north side of Cuba; the adventure to continue until the goods are safely landed at Barracoa, and one or two ports on the north side of Cuba. The vessel arrived at Barracoa the 26th June, and staid there until the 30th October, 1799, without being able to sell the cargo, except a small part, and without selling any of the goods of the insured; and the vessel was forcibly entered by pirates, who carried away 4760 dollars in cash, and a great quantity of goods. The vessel set sail for the Havana, but was compelled by stress of weather and want of provisions to go to New Providence, where she arrived the 15th December, where the goods

remaining were sold for 3701 dollars, (the invoice amount of the cargo being about 16,500 dollars,) and the voyage broken up, and an abandonment made as for a total loss. It was held, that the stay at Barracoa did not amount to a *deviation*; that the breaking bulk at Barracoa, did not put an end to the voyage there, and that the breaking up the voyage at New Providence was justifiable, and a sufficient ground of abandonment, so as to entitle the plaintiff to recover for a total loss.

Gilfert v. Hallett and Bowne, 296.

Cases and authorities, 298, 299, 300, n. (a,) (b,) (c.)

VI. *Loss.*

1. *Adjustment of.*

12. An adjustment of loss endorsed on a policy of insurance, and signed by the insurer, is not conclusive; and the party may show that it was made on the misrepresentation of the insured; and whether such misrepresentation proceeded from design or mistake, makes no difference.

Faugier v. Hallett, 233.

(a) Adjustment—form of, 234, n. (b.)

(b) Effect of. *Id.*

(c) When opened. *Id.*

(d) Effect of mistake of law in. *Id.*

(e) Conditional. *Id.*

2. *Partial and total.*

13. Goods were insured from New York to Havre, and a separate policy was also made on the profits. The vessel was captured and carried into London, and the goods labelled there. Five-eighths of the goods were restored to the insured who received and appropriated them to their own use. The insured abandoned to the insurers on the policy on the profits, as for a total loss. The insured claimed and recovered an average loss of three-eighths only on the goods. It was held, that they were entitled only to a partial loss of three-eighths on the profits. *Tillinghast and Loomis v. Shaw*, 36.

Cases and authorities, 37, n. (a) and (b.)

VII. *Neutrality, breach of.*

14. A vessel was insured from New York to Amsterdam, and at the time of her sailing from New York, it was not known that the Texel was blockaded by the British. The master, during the voyage, put into Cruzhaven, and was there informed that Amsterdam was blockaded; but supposing that he should not be captured for the *first* attempt, sailed from Cruzhaven with the intention of entering Amsterdam, knowing it to be blockaded; and on his way the vessel was captured by a British cruiser and condemned; it was held, that sailing for a port understood to be blockaded is not a breach of neutrality, so as to affect the warranty in a policy of insurance.

Vos and Graves v. The United Insurance Company, 469.

Reversing decision of Supreme Court, 180.

Cases and authorities, 191, n. (b.)

VIII. *Policy.*1. *Upon bottomry interest.*

15. An insurance on the vessel will not cover a *bottomry* interest, unless it is expressly mentioned in the policy.

Robertson and Brown v. United Ins. Co. 250.

2. *Construction of.*

(a) "*All articles perishable in their own nature, "skins," "hides."*"

16. A policy of insurance contained a memorandum, "that salt, &c. and all articles that are perishable in their own nature, are warranted by the assured free from average, unless general; and sugar, &c. *skins, hides* and tobacco, are warranted free from average, under seven per cent. unless general." A quantity of *deer skins*, part of the cargo, were damaged, by which a loss of ten per cent. on the cargo was occasioned. It was held, that the deer skins were not comprehended under the general words of the memorandum, as to articles perishable in their own nature, but under the clause relative to *skins and hides*, and that the insured were, therefore, entitled to recover. *Bakewell v. United Ins. Co.* 246.

Authorities, 248, n. (b.)

(b) "*Dried fish,*" "*all other articles perishable in their own nature.*"

17. Where "*dried fish,*" were enumerated among the articles in the memorandum to a policy of insurance, as free from average, unless general; as also, "*all other articles perishable in their own nature;*" it was held, that *pickled fish* were not included in the memorandum, and that the plaintiff might recover for an average loss on them. *Baker v. Ludlow*, 289.

Authorities, 290, n. (b.)

(c) "*French risks excepted.*"

18. Where a vessel was insured, excepting *French risks*, and was captured by a French privateer, and after being detained four days, was recaptured by a British frigate, and condemned as French property, it was held, that the insured could not recover. *Roget v. Thurston*, 248.

19. The detention, like a deviation for that period, altered the risk, and must, therefore, be considered as discharging the policy. Per *Radcliff, J. Id.*

Authorities, 250, n. (a.)

(d) "*Lawful goods.*"

20. In an action on a policy of insurance on "*all lawful goods, &c. against all risks,*" it was held, that the insurance covered all goods lawful to be exported from the United States, though *contraband of war*, and owned by a subject of one of the belligerents. *Skidmore v. Desdoity*, 77.

Cases, 77, n. (a.)

21. Articles *contraband of war*, are lawful goods, within the meaning of those words in a policy of insurance. Goods not prohibited by the laws of the country to which the vessel belongs, are lawful goods, and the insured are not bound to disclose to the insurers, that the goods are *contraband of war*.

Affirmed in the Court of Errors, 487.

Juhel v. Rhineland, 120.

Cases, 120, n. (a.)

3. *Wager.*

22. Validity of, considered, 335, n. (b.) See also *supra*, *Juhel v. Church*.

4. *Action on—Evidence.*

23. In an action on a policy of insurance, the words condemned as lawful prize in the sentence of a court of admiralty, affords no necessary inference that the vessel was enemy's property; and such sentences are not conclusive evidence of the fact. *Goix v. Low*, 480.

24. The question considered, 480, n. (a.) (b.) (c.)

25. A sentence of a court of admiralty is only *prima facie* evidence of any fact, and will have no effect, if sufficient appears in the sentence to rebut the presumption of the existence of such fact.

Johnston and Weir v. Ludlow, 481.

Authorities, 486, n. (b.)

26. In an action on a policy of insurance, the sentence of a foreign court of admiralty is not conclusive evidence as to the character of the property, and a breach of the warranty of neutrality.

Vandenheuvel v. The United Insurance Company, 451.

Cases and authorities, 468, n. (a) and (b); 144, n. (b); 168, n. (a) and (b.)

27. Where a policy of insurance contained the following clause: "It is also agreed, that the property be warranted by the assured, free from any charge, damage, or loss which may arise in consequence of seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war," and the vessel and cargo having been captured, part of her cargo, consisting of block tin and tin plates, was condemned as contraband of war, it was held, that the insured were entitled to recover for any loss in consequence of the capture; the sentence of the court of admiralty not being conclusive evidence that the tin was contraband of war.

Laing v. The United Insurance Company, 487.

Reversing decision of Supreme Court, 174.

Authorities, 174, 177, 179, n. (a) and (b.)

IX. *Premium.*

28. A policy of insurance was effected on the cargo of a ship from Calcutta to Baltimore, by A. as the agent of B. and for his account. The policy was in the name of A. generally, for 25,000 dollars, as interest might appear. The cargo belonged to B. and four other persons, and was purchased with the proceeds of the outward cargo. B. carried on business for himself, and was unconnected in trade with the other persons, who knew nothing of the insurance. The proportion of the return cargo belonging to B. in fact amounted only to about 13,000 dollars. B. brought an action for a return of premium, for the difference of the sum subscribed to the policy, and the amount of his interest; it was held, that B. and the four others were not partners, and that B. was entitled to recover back the premium for the amount of his interest overvalued in the policy.

Holmes v. The United Ins. Co. 329.

29. If property be insured to a larger amount than the real value, the overplus

premium is recoverable by the assured, because the insurer shall not receive the price of a risk which he has not run. Per *Kent, J. Id.*

Cases and authorities, 330, n. (a) and (b.)

30. A. having chartered a ship to bring a cargo from the Spanish Main to New York, effected a policy of insurance on the profits, valued at 12,000 dollars; no other proof of interest to be required but the policy; and if the goods did not arrive, the insured was to recover for a total loss; and the goods were warranted free from average and without benefit of salvage to the insurer. The vessel finding no cargo at the Spanish Main, returned to New York in ballast, without any goods. A. brought an action against the insurer for a return of premium; and it was held, that the insurer having run the risks enumerated in the policy, and the ship having returned in safety, A. was not entitled to a return of premium.

Juhel v. Church, 333.

X. Representation.

See 170, n. (b); 171, n. (a); 173, n. (b); 129, n. (a.)

XI. Seaworthiness.

See WARRANTY, *Infra*, XII. 2.

XII. Warranty.

1. Express, what amounts to.

See *Infra*. AMERICAN SHIP.

2. Construction of.

(a) American property.

31. A vessel belonging to A. who was a natural born citizen of the United States, was insured, by a policy, dated the 1st of November, 1796, on a voyage from New York to London; and was warranted American property. Afterwards, and before the vessel actually sailed on the voyage insured, viz. on the 27th of April, 1797, A. sold and transferred the vessel to B. a native of Great Britain, who had emigrated to New York, and become a naturalized citizen of the United States, on the 6th of April, 1797. The vessel having been captured by the French, and condemned as good prize; it was held, in an action on the policy, that B. was to be considered as having emigrated, *flagrante bello*, and a British subject, so as to justify the condemnation; and that A. having by his own act, before the commencement of the risk, changed the property from neutral to belligerent, there was a breach of the warranty. *Jackson v. The New York Insurance Company*, 191.

Reversed, see *infra*, Neutral Property, *Dugest v. Rhinelanders*.

Authorities, 195, n. (a.)

(b) "American Ship."

32. If a vessel be described in a policy of insurance as an American ship, it is a warranty that she is American.

Murray v. The United Insurance Company, 168.

33. Where an American vessel was transferred to A. in trust to secure a debt due to B. who was a British subject, it was held, that B. being the *custody* *que* trust of the profits of the vessel, and a subject of one of the belligerents, the vessel ceased to be American; and the fact not being communicated to the insurers, the policy was void; and the insured entitled to a return of premium only. *Id.*

See 173, n. (b.)

(c) "Illicit," "prohibited," or "contraband trade."

34. Where a policy of insurance contained the following clause: "It is also agreed, that the property be warranted by the assured, free from any charge, damage, or loss which may arise in consequence of seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war," and the vessel and cargo having been captured, part of her cargo, consisting of block tin and tin plates, was condemned as contraband of war, it was held, that the insured were entitled to recover for any loss in consequence of the capture; the sentence of the court of admiralty not being conclusive evidence that the tin was contraband of war.

Laing v. The United Insurance Company, 487.

Reversing decision of Supreme Court, 174.

35. A subject of Great Britain domiciled in New York, and engaged in trade from the United States with the enemies of Great Britain, is considered as a citizen of the United States in regard to such trade, which is not within the clause in the policy of insurance by which the property is warranted by the assured free from any charge, &c. in consequence of a seizure or detention for or on account of any illicit or prohibited trade, &c.

Johnston v. Ludlow, 481.

36. To constitute a breach of the warranty by the assured against seizure or detention on account of illicit or prohibited trade, &c. there must be an illicit or prohibited trade, in fact, existing. It is not sufficient that there has been a condemnation under *pretext* of such a trade. *Id.*

Authorities, 486, n. (b.)

37. See further, upon the construction of warranties, 129, n. (a.)

(d) "Neutral property."

38. Where a subject of a belligerent state emigrates to this country, *flagrante bello*, and becomes naturalized, such naturalization will support a warranty of neutral property, in a policy of insurance; and the assured need not disclose to the insurer the time of his emigration.

Duguet v. Rhinelander, 476.

Authorities, 479, n. (b.)

3. Implied—Seaworthiness.

39. It is an implied warranty in every contract of insurance, whether on a vessel or goods, that the vessel is seaworthy, and competent to perform the voyage: and it makes no difference, though the vessel was surveyed before she sailed, and pronounced by carpenters to be competent, if she proves, in the course of the voyage not to be seaworthy.

Warren v. The United Ins. Co. 231.

40. What is required to answer the warranty of seaworthiness, 232, n. (a.)

4. *Breach of.*

See 129, n. (a.) *Supra*, XII. 2.

JAIL LIBERTIES.

I. *Bond for, when good.*

II. *Escape from.*

I. *Bond for, when good.*

1. If a bond be taken by the sheriff for the ease and convenience of the prisoner, so that he may go at large within the walls of the prison, and conditioned that he shall remain a true and faithful prisoner, it is not a bond for ease and favor, nor void, though not taken in the manner directed by the act relative to jail liberties. *Dole v. Bull and Porter*, 239.
2. A bond taken by the sheriff, that a person in execution shall remain a true and faithful prisoner, is valid. *Id.*
3. A bond taken by the sheriff to induce a less rigorous imprisonment is good, if the indulgence be such as he would otherwise, consistently with his duty, be authorized to grant; but, if it confer a privilege inconsistent with his duty by which the object of the imprisonment, as a means to compel a satisfaction of the plaintiff's demand, may be impaired or defeated, the bond is illegal and void. Per *Radcliff, J. Id.*

Cases and authorities, 245, n. (a.)

II. *Escape from.*

4. A bond was given to the sheriff by a prisoner in execution, to remain a faithful prisoner within the liberties of the prison. The prisoner afterwards, accidentally, walked sixteen feet over the prescribed limits, which in many parts were bounded by an imaginary line, and returned immediately, without the knowledge of the sheriff, and before any action brought; it was held, that no action could be maintained on the bond, which was given for the indemnity only of the sheriff, and this being a mere voluntary escape, and a voluntary return, before action brought, the sheriff could not be damaged. *Dole v. Moulton and others*, 205.

Cases and authorities, 209, n. (a) and (b.)

See ESCAPE.

JUDGMENT.

I. *Arrest of.*

II. *Error in.*

III. *Satisfaction of, by Plaintiff, after assignment and notice.*

IV. *Trial of issue of payment after assignment.*V. *Trial of issue of usury in.*VI. *Whether "Judgment," within the words of the Statute of Usury.*I. *Arrest of.*

See PRACTICE, IX.

II. *Error in.*

1. Where judgment rendered for a larger sum than the damages laid in the plaintiff's declaration, 18, n. (a.)
2. Remittitur of excess. *Id.*

III. *Satisfaction of, by Plaintiff, after assignment and notice.*

3. Where the plaintiff after he had assigned a judgment to a third person, and given notice to the defendant of such assignment, entered up satisfaction on the record, the court on motion, ordered the entry of satisfaction to be vacated. *Wardell v. Eden*, 258.

IV. *Trial of issue of payment after assignment.*

4. Where the defendant alleged payment to the plaintiff, made by him, on a judgment which had been assigned to a third person, the court, on motion for that purpose, refused to award an issue, to try the truth and validity of the payment; but left the party to his remedy by *audita querela*, as the time when the defendant received notice of the assignment was contested; though the court might, if they had thought proper, have stayed execution on the judgment, until it was revived by *scire facias*, or by an action of debt, when the plaintiff might plead the payments. *Wardell v. Eden*, 258.

V. *Trial of issue of usury in.*

5. The proper way to try the truth of the allegation of usury, in regard to a judgment, entered upon a bond and warrant of attorney, is to retain the judgment, and award a feigned issue to try the fact.

Wardell v. Eden, 258.

6. Where there is color for the allegation that a bond on which a judgment has been entered up on a warrant of attorney is usurious, the court will award a feigned issue to try the fact. *Gilbert v. Eden*, 280.

Authorities, 280, n. (a.)

VI. *Whether "Judgment," within the words of the Statute of Usury.*

7. A judgment is not within the statute against usury.

Wardell v. Eden, 121.

See DAMAGES, III. EVIDENCE, V.

JURY, DISCHARGE OF.

- I. *In capital cases.*
II. *In other criminal cases.*

I. *In capital cases.*

1. Whether the court can discharge a jury in a capital case on the ground that they cannot agree. *Que.* Per *Kent, J.* *The People v. Olcott*, 301.
2. The question considered, 312, n. (c.)

II. *In other criminal cases.*

3. A. and B. were indicted for a conspiracy to defraud C. B. was acquitted, and the jury being unable to agree on a verdict whether A. was guilty or not, the court, against the consent of A. ordered a juror to be withdrawn, and the jury discharged. It was held, that the court may, in their discretion, in a criminal case, discharge a jury who are unable to agree on a verdict, and against the consent of the defendant, who may be brought to trial a second time for the same offence.

The People v. Olcott, 301.

4. The court of sessions has power to discharge a jury, without the consent of the prisoner, in case of an indictment for a misdemeanor; but the power rests in sound discretion, and ought to be exercised with caution.

The People v. Denton, 275.

5. Where a jury could not agree on a verdict, after being out all night, and part of a day, and the court discharged them, without the consent of the party, the discharge was held to be proper, and the prisoner was again arraigned on the indictment for the same offence. *Id.*

See CONSPIRACY, II.

JUSTICE AND JUSTICE'S COURT.

I. *Certiorari to.*

1. *Motion of Justice to quash.*
2. *Effect of as supersedeas.*

II. *Action against, for want of Jurisdiction.*

1. *When liable.*
2. *When not liable.*
3. *How Jurisdiction of, must appear.*

I. *Certiorari to.*1. *Motion of Justice to quash.*

1. A justice cannot move to quash a *certiorari* directed to him. He must obey it at his peril ; and return what is legally required of him, and take no notice of what he is not bound by law to return.

Van Patten v. Onderkirk, 108.

2. *Effect of as supersedeas.*

28, n. (a.)

II. *Action against, for want of Jurisdiction.*1. *When liable.*

2. Where a justice of the peace, under the ten pound act, issued an execution against the body of a defendant who was by law privileged from imprisonment, voluntarily, and without the request or authority from any plaintiff, it was held, that he was liable to an action for false imprisonment

Percival v. Jones, 49.

3. Where a justice, after a *certiorari* from this court was delivered to him, proceeded to try the issue of traverse on an indictment under the act to prevent forcible entries and detainers, and the defendant being found guilty, the writ of restitution was issued, and the defendant turned out of possession, it was held, that the proceedings of the justice, after the *certiorari*, were *coram non judice*, and void, and that the justice was liable to an action of trespass. *Case v. Shepard*, 27.

Cases and authorities, 50, 51, n. (a,) (a,) (b,) (c) ; 28, n. (b.)

2. *When not liable.*

4. While a justice acts ministerially, or as a clerk of the party, he will be justified in issuing any process within his jurisdiction that may be demanded by the plaintiff. But in order to charge the plaintiff in the suit, it should appear that it was really his act ; it ought not to depend on the general intendment of the law that every writ or process is purchased by the party in whose favor it issues. *Percival v. Jones*, 49.

Cases and authorities, 28, n. (b.)

3. *How Jurisdiction of, must appear.*

28, n. (b.)

LACHES.

See AGENT, III. BAIL, IV. 1. BILLS OF EXCHANGE AND
PROMISSORY NOTES, I. II. 4.

LANDLORD AND TENANT.

I. *Showing Title out of Landlord.*II. *When the relation exists.*

I. *Showing Title out of Landlord.*

1. Where A. who had been many years in possession of land under B., the supposed proprietor, applied afterwards to C. as the real owner, to purchase, and requested to be considered as tenant; in an action of ejectment by C. against A. it was held, that A. might show that he made the application under a mistake, and prove a title out of C. though he could not set up an adverse possession of twenty years.

Jackson ex dem. Viely and Clark v. Cuerden, 353.

Authorities, 355, n. (a.)

II. *When the relation exists.*

2. A. was not tenant to C. so as to be entitled to a notice to quit.

Jackson ex dem. Viely and Clark v. Cuerden, 353.

LEGACY.

I. *Construction of Testament, when Legacy due, and interest on.*

II. *Evidence in action for.*

III. *When Legacy is presumed to be given in satisfaction of debt.*

I. *Construction of Testament, when Legacy due and interest on.*

1. A. devised his lands to his two sons, charged with the payment of specific sums by each to his executors, and bequeathed to his granddaughter, two hundred pounds, to be paid to her when she came of age out of the sums so directed to be paid by his sons to his executors. It was held, that the legacy to the granddaughter, carried interest from the time it was due, and not before; and that it was due when the legatee arrived at the age of twenty-one years.

Van Bramer and wife v. The Executors of Hoffman, 200.

2. Where a legacy is given to a child, payable at a particular time, and no provision is made for its maintenance, equity will decree interest from the testator's death, by way of maintenance. But this rule does not apply to a legatee who is a grandchild. Per *Radcliff, J. Id.*
3. If a legacy be charged on land, and no time of payment is mentioned in the will, the rule is that it shall carry interest from the time of the testator's death. Per *Radcliff, J. Id.*

Cases and authorities, 202, 203, n. (a.) (a.)

See also *Infra*, II.

II. *Evidence in action for.*

4. In an action brought by A. against an executor for a legacy, the defendant

offered in evidence an account, and certain bonds which had been paid and cancelled by the testator, on which there was an endorsement by the testator, that by agreement between A. and B. they were to be charged to the account of A. and the bonds were for that reason cancelled. The endorsement was prior to the date of the will. It was held, that the account, and endorsement made on the bonds, were not sufficient evidence to support the debt set up against A. by the executor. And that if the debt had been proved, it would not have been released or extinguished by the legacy.

Rickets and wife v. Livingston, 97.

III. *Where Legacy is presumed to be given in satisfaction of debt.*

102, n. (a.)

LICENSE.

To sell liquor or keep an inn—jurisdiction of board or officer to grant—irregularity in granting—license by parol, 349, n. (b.)

LIMITATION.

A. being seized of lands, by indenture, "in consideration of natural love and affection, and for the better maintenance of the grantee, conveyed the premises by the words, 'give, grant, alien, enfeoff and confirm,' to his daughter, H. and B. her husband, to the use of H. for life, with power to her to sell the same in fee, at any time, if she choose, to any person, by deed or will, and the money arising from such sale to keep for her own use and maintenance; and in case the said H. should not sell the premises, then, after her death, he the said A. conveyed the same to B. the son-in-law, for life, and after his death, to the heirs of the body of H. and his, her, or their heirs and assigns for ever, equally to be divided between them, share and share alike." B. and H. took possession, and, afterwards, for the consideration of five shillings by lease and release, conveyed the premises to C. in fee, in trust that he should reconvey the same premises to B. in fee; and C. being so seized by virtue of such lease and release, on the next day, for the consideration of ten shillings, reconveyed the premises to B. who, afterwards made his will, devising the premises to D. for 31 years, and died. H. died without issue, and A. afterwards died, leaving four sons and four daughters, his heirs at law. In an action brought by the heirs at law against a tenant under D. it was held, that H. took an estate for life, with a vested remainder in tail; that the words "heirs of the body," &c. were words of limitation and not of purchase, notwithstanding the words added, "and to his, her, or their heirs and assigns," &c. which were to be rejected as repugnant to the estate created by the preceding words; and that the power to H. was intended for her benefit, and was well executed; and the estate vested in B. and those claiming under him.

Brant ex dem. The Heirs of Provoost v. Gelston, 384.

See **SHELLY'S CASE, RULE IN.**

LOCAL ACTION.

See ACTION.

MANDAMUS.

I. *General principles on which granted.**Not where another adequate specific legal remedy.*II. *To Inferior Courts.*1. *Where it lies.*2. *Where it does not lie.*III. *Practice.*IV. *Analytical Index to Note (b,) p. 217.*I. *General principles on which granted.**Not where another adequate specific legal remedy.*

1. Where the plaintiffs, who were administrators in a cause in the court of common pleas, recovered less than twenty-five dollars damages, and that court gave judgment for the damages, but not for the costs, this court refused to grant a *mandamus* to compel them to give judgment for the costs. The proper remedy is by a writ of error. *Jansen et al. v. Davison*, 72.

Cases and authorities, 73, n. (a.) ; 217, n. (b.)

II. *To Inferior Courts.*1. *Where it lies.*

2. If a court of common pleas, without sufficient ground, refuse to seal a bill of exceptions, it is a contempt, and this court will award a *mandamus* to compel them to sign it.

People ex rel. Allaire v. Judges of Westchester, 118.

Cases and authorities, 118, n. (b.) ; 217, n. (b.)

3. Where a verdict is found for the plaintiff, and the judgment of the court below is arrested, and the plaintiff wishes to bring a writ of error, the proper course is for the plaintiff to move the court for judgment against himself, and for the defendant, for the insufficiency of the declaration, on which judgment a writ of error will lie, but not on an arrest of judgment. If the court below refuses to give such judgment, on the prayer of the party, this court will grant a *mandamus* to compel them to give judgment.

Fish v. Weatherwax, 215.

Cases and authorities, 217, n. (b.)

2. *Where it does not lie.*

4. If a bill of exceptions tendered to a court be untrue, it is a sufficient cause to refuse a *mandamus* to compel them to sign it.

People ex rel. Allaire v. Judges of Westchester, 118.

Cases and authorities, 217, n. (b.)

III. *Practice.*

5. Where a court of common pleas refuses to give judgment in a cause before them, this court will not grant a *mandamus*, until after a rule to show cause has first been granted for the purpose.

The People v. The Judges of Cayuga, 68.

Cases and authorities, 68, n. (a.) ; 217, n. (b.)

IV. *Analytical Index to Note (b,) p. 217.*

- I. OF THE NECESSITY, ORIGIN AND NATURE OF MANDAMUS.
- II. OF WHO MAY ISSUE THE WRIT.
- III. OF THE PRINCIPLES UPON WHICH THE WRIT OUGHT TO BE ISSUED.
- IV. OF MANDAMUS TO INFERIOR TRIBUNALS AND JUDICIAL OFFICERS GENERALLY.
- V. OF MANDAMUS TO INFERIOR OFFICERS GENERALLY.
- VI. OF PARTICULAR CASES OF MANDAMUS TO INFERIOR COURTS AND OFFICERS.
- VII. OF MANDAMUS TO CORPORATIONS.
- VIII. OF THE PROCEEDINGS ON MANDAMUS.
- IX. FORMS.

I. OF THE NECESSITY, ORIGIN AND NATURE OF MANDAMUS.

1. *Necessity.*

- 6. A power must exist to compel subordinate officers and tribunals to perform their acts, which public justice demands, § 1, § 30.
- 7. And as specific remedies may fail, a residuary remedy is necessary, § 1.

2. *Origin.*

- 8. Of doubtful antiquity, but much extended within the last century, § 1.

3. *Nature.*

- 9. A writ from a superior court having jurisdiction, to inferior court, corporation or individual, commanding an act of public duty to be done, § 1, 2, § 30.
- 10. The value of the matter or the degree of its importance to the public police, is not scrupulously weighed, § 1, § 30.
- 11. A prerogative writ, and why called so, § 4, 3.
- 12. As a consequence, discretionary—of the nature of the discretion to issue the writ, § 4.
- 13. Of the effect of a remedy in equity on the discretion, § 13.

II. WHO MAY ISSUE THE WRIT.

- 14. By common law, the K. B.
- 15. Those courts which possess the general superintending power of the K. B.
- 16. Those courts upon which the power is conferred by statute.
 - (a) Acts of congress, 1789, § 13 ; 1833, § 2 ; powers of the U. S. Supreme and Circuit Courts.
 - (b) Statutes of New York, Massachusetts, Maine, Mississippi, Michigan, Ohio, Pennsylvania, New Jersey.

17. State court cannot issue to a United States officer, *as such*.

§ 3, and note.

III. OF THE PRINCIPLES UPON WHICH THE WRIT OUGHT TO BE ISSUED.

18. Only to enforce a *public* right or a *public* duty.
- (a) The character of the person sought to be commanded must be public.
 - (b) The act in respect of which is sought to be commanded must be public.
 - (c) Cases of private persons and of private acts. §§ 5, 6.
19. The right or duty in respect of which mandamus is sought, must be of a legal character. Cases, § 7.
20. The right or duty must be perfect, and not inchoate. Case, § 8.
21. It is a general rule, that where there is any other remedy, mandamus will not lie—as,
- (a) A remedy by error or appeal.
Reason of this, and cases, § 9.
Cases where inferior tribunal will not give judgment, so that error can be brought, § 10.
 - (b) A remedy by action. Cases, §§ 11, 12.
 - (c) A remedy by quo warranto. Cases and authorities, § 12.
Cases when quo warranto will not lie, § 12.
 - (d) Or by *quare impedit*. Cases, § 12.
21. (a) Exceptions to the general rule—these arise from the nature of the excluding remedy, which must be adequate, specific and legal.
- (a) “Adequate,” not obsolete—cases,—nor tedious—cases.
 - (b) “Specific,” not a criminal prosecution,—cases—nor action on the case for neglect of duty,—cases—for neither can compel the special act to be done.
 - (c) “Legal,” not equitable—cases.
22. The right or duty, in respect of which the writ of mandamus is prosecuted, must be positive, and not resting merely in discretion. Cases.
- (a) What is meant by the discretion of inferior officers and tribunals—cases. See preface to this volume.
 - (b) The duty to decide may be commanded, when that does not rest in sound discretion. Cases, § 12, §§ 16–27.
23. A mandamus will not be issued unless the party against whom it is sought has refused to perform his duty, or by some act equivalent to such a refusal manifested such an intention. Cases, § 15.
24. Nor will it be granted, when the party applying has slept upon his rights. Cases, § 16.

IV. OF MANDAMUS TO INFERIOR TRIBUNALS AND JUDICIAL OFFICERS GENERALLY.

25. Cases of discretion—mandamus will not lie.
- I. Regulation of the practice in many instances. Cases, § 17.
 - II. Supervision of the course of pleading in many instances. Cases, § 18.

- III. Decisions of applications for new trials by certain tribunals in certain cases. Cases, § 19.
- IV. In judging whether a contempt has been committed against it. Authorities, § 20.
But where the civil rights of a third person becomes implicated, the writ lies. Case, § 20.
- V. Other cases not classified, § 21.
- VI. Admission and restoration of attorneys, but of this there is some doubt, § 28.
- 26. Cases when the act sought to be commanded would render the parties liable to an action—mandamus will not lie, § 22.
- 27. Cases where mandamus is applicable to inferior tribunals and judicial officers.
 - I. It is the remedy to compel a discretion to be exercised or judgment to be given. Cases, § 23.
Distinction to be observed between direction *to act* and *how to act*. Cases, § 23.
 - II. To compel a judicial officer to sign or amend a bill of exceptions, or settle a case according to the facts. Cases, § 24.
But the bill or case must be tendered in time. Cases, § 24.
 - III. To compel an inferior court to grant the usual legal process to enforce a judgment. Cases, § 25.
 - IV. To compel an inferior court of appellate jurisdiction, to do acts to render an appeal effective. Cases, § 26.
But the appellant must not be in fault. Cases, § 26, § 16.
 - V. To compel such a tribunal to grant or vacate an order for a new trial, when there is no discretion to do otherwise. Cases, § 27.
 - VI. To compel an inferior court to admit or restore an attorney, but the better opinion seems to be, that it will not lie for such a purpose, such act being judicial or discretionary. Cases and the question considered, § 28.
 - VII. It may be generally stated under the principles upon which the writ ought to be issued, (§§ 4–17,) that the writ lies to any inferior court or judicial officer, to compel the performance of any duty, whether ministerial or judicial, so that there should not be a failure of substantial justice. Cases and authorities, § 29.
- V. OF MANDAMUS TO INFERIOR OFFICERS GENERALLY.
- 28. Of the reason of mandamus to inferior officers. Cases, § 30.
- 29. Who are public officers.
 - Private individuals standing in a *quasi* public character, as arbitrators, referees, &c. are public officers. § 36, p. (217), 37, 38, tit. Office; § 37, tit. Clergymen. *Id.*
 - I. Will not lie where there is a discretion. Cases, § 31.
 - II. Or where it subjects the officer to an action, or to costs, for which he has no means of reimbursement. Cases, § 32.
 - III. Nor when the merits of the case are against the application. Cases, § 33, § 32.

30. Will lie.

I. To compel the exercise of a discretion, but not the mode of exercise.

Cases, § 34.

II. Generally, subject to the rules before considered, (§ 4-17,) whenever the act required to be performed is ministerial in its character, involving a direct duty imposed upon him by law. Authorities, § 35.

VI. OF PARTICULAR CASES OF MANDAMUS TO INFERIOR COURTS AND OFFICERS.

31. These are alphabetically arranged, § 37. ●

VII. MANDAMUS TO CORPORATIONS.

32. The reason of, § 38, p. (217,) 52; § 1, p. 217.

33. Will not lie.

I. To control the discretion of a corporate body or officer. Cases, § 38, p. (217,) 52, 53, 54.

34. Will lie.

I. To compel a discretion to be exercised, though not to direct the manner of its exercise. Cases, § 39, p. (217,) 54.

II. To compel the election of officers and members. Cases and authorities, § 40, p. (217,) 55.

Case of a private corporation. *Id.*

III. To compel a corporator of a public corporation duly elected to take upon himself the execution of the office, when there is no sufficient excuse for not accepting the same. Cases, § 41, p. (217,) 56.

IV. To compel a corporation to admit one elected to an office or franchise in a corporation to the legal possession of his right. Cases and authorities, § 42, p. (217,) 56, 57.

V. To restore wherever it would be granted to admit a member or officer of a corporation. Cases and authorities, § 43, p. (217,) 57, 58; § 37, tit. Office; p. (217,) 47, 48.

VI. To compel the removal of officers in certain cases. Cases and authorities, § 44, p. (217,) 59.

VII. To compel other acts which they or their officers are bound to do, either by notice of their official station or by the law of the land. Cases, § 45, p. (217,) 59, 60, 61.

VIII. OF THE PROCEEDINGS ON MANDAMUS.

35. Recurrence to the common law necessary to ascertain when a mandamus ought to issue in cases not pointed out by statute. Cases, § 46, p. (217,) 61, 62.

36. Proceedings upon mandamus according to the common law, except in the case of an intervening statute. Cases, § 46, p. (217,) 62.

37. The application must be founded on affidavit. Cases and authorities, § 47, p. (217,) 62, 63.

(a) Of the title—any title fairly descriptive of the proceeding on which an indictment for perjury will lie, if false, is sufficient. *Id.*

- (b) Of the body—it should contain a precise statement of all the substantial facts upon which the party relies, in such form that an indictment can be founded thereon if false. *Cases. Id.*
 Must show a default. *Id.*
 That the applicant has applied to defendants to do what he requires, and their refusal or neglect. *Id.*
 That the applicant has complied with all necessary forms to constitute his right, and entitle him to the relief he prays. *Id.*
 Anticipation of facts expected to be stated on the other side. *Id.*
- (c) Defendant's affidavit may be used to supply a material fact omitted or defectively stated. *Id.*
38. The application for the writ. *Cases, § 48, (217,) 63.*
- (a) Either *ex parte* or upon notice.
 Notice required in *street cases*. *Cases. Id.*
 Court will not act until due notice given. *Cases and authorities. Id.*
- (b) Either for a rule to show cause or for a peremptory mandamus. *Id.*
 Notice required on application for a peremptory mandamus. *Id.*
 But a rule will be granted *ex parte*. *Id.*
- (c) The application for a rule *nisi* is the usual mode of proceeding. *Id.*
39. The writ.
- I. As to the joinder of plaintiffs. *Cases and authorities, § 49, p. (217,) 63, 64.*
 Will not be issued to enforce the separate rights of several individuals. *Id.*
- II. To whom directed. *Cases, § 50, p. (217,) 64, 65.*
1. To him who by law is obliged to execute it. *Cases. Id. § 51, p. (217,) 65.*
2. When directed to a corporation, it must be directed to them in their proper name and capacity. *Cases, § 51, p. (217,) 65.*
 But objections on this ground must be taken *in limine*.
Cases. Id.
3. Supersedeas will be granted for misdirection, *quia improvide emanavit*. *Cases. Id.*
- III. Of the body of the writ. *Cases, § 52, p. (217,) 65, 66 ; § 65, p. (217,) 77.*
- The writ should contain all those facts which are necessary to show that the party applying for it is entitled to the relief prayed for as. *Cases. Id.*
- (a) The title of the relator. (*Id.*) Not enough to refer to affidavits on file to show it. *Id.*
- (b) The duty to be performed, but not particularly by what authority this duty exists. *Id.*
Cases of command to admit or swear in.
 “ “ to serve in an office.
 “ “ to produce record.
 “ “ to read a bill of exceptions.
- (c) As to tests and return. *Id.*

40. Amendment of the writ. Cases and authorities, § 53, p. (217,) 66, 67.
 - (a) May be made before returnable but not after. *Id.*
 - (b) But prosecutor may move to quash, and have a new writ. *Id.*
41. Of the service of the writ. Cases and authorities, § 54, p. (217,) 66.

By delivering copy and showing the original—mode of service in a county court. *Id.*
42. Of the notice to quash or supersede the writ. Cases and authorities, § 55, p. (217,) 67, 68.
 - (a) Objections to the form merely must be taken *in limine*. *Id.*
 - (b) Substantial objections may be taken before the issuing of the peremptory mandamus. *Id.*

Cases of misdirection.

 - " misjoinder.
 - " defect that renders the writ *felo de se*.
 - " writ served out in violation of the intention of the court.
 - (c) Motion to quash by prosecutor. *Id.* § 53, p. (217,) 67.
 - (d) Notice of motion to quash or supersede must be given. *Id.*
42. Of attachment on default of a return. Cases, § 56, p. (217,) 69, and n. *.
43. Of enlarging time to make a return, p. (217,) 64, note *.
44. By whom the return is to be made, and how made. Cases, § 59, p. (217,) 69.
 - (a) By him to whom the writ is directed. Cases and authorities, *Id.*

Cases of return by ex-corporate officers. *Id.*
 - (b) Return without privity or consent of the person to whom the writ is directed. *Id.*
 - (c) How made. *Id.* And § 61, p. (217,) 74.
45. The return. Cases and authorities, § 58, 59, 60, 61, 62, p. (217,) 70, 71, 72, 73, 74.
 1. Must state the facts which constitute a defence. *Id.*
 2. Must be certain—certainty to a common extent sufficient—presumption and intendment not allowed against return, but rather in its favor. *Id.*
 3. Cases of good and bad returns. *Id.*
 4. Need not be signed or verified at common law. Cases and authorities, § 60, p. (217,) 74.
 5. Amendment, and motion of defendant to quash at the return.
 - (a) Amendments allowed with caution.
 - (b) Clerical mistakes may be amended after return filed.
 - (c) Officer amerced at common law for ill return.
50. Of traverse plea and demurrer to a return. Cases and authorities, § 63, 64, 65, 66, 67, p. (217,) 75, 76, 77.
51. Of the action for a false return. Cases and authorities, § 68, p. (217,) 77, 78.
 - (a) The only remedy when no right given to traverse, &c., by statute. *Id.*
 - (b) May be brought after judgment given on the return, not before. *Id.*
 - (c) Lies as well for a *suppressio veri* as a *suggestio falsi*. *Id.*

- (d) No objection arising out of the mandamus or return can be taken in this action. *Id.*
- (e) Form of declaration. *Id.*
- (f) Evidence. *Id.*
- (g) The action local. *Id.*
- 52. Of the peremptory mandamus. Cases and authorities, § 69, p. (217,) 68, 69.
 - I. Where it may be issued.
 - (a) Without an alternative mandamus. *Id.*
 - (b) Where alternative writ has been regularly served, and no return. *Id.*
 - (c) When return insufficient. *Id.*
 - (d) When return has been falsified in an action in the case; (see § 68, p. (217,) 78,) or upon plea, demurrer, or by default. *Id.*
 - II. The form thereof. *Id.*
 - III. The practice. *Id.*
- 53. Of the mode of enforcing obedience to the peremptory mandamus. Cases and authorities, § 70, p. (217,) 79, 80.

By attachment moved for on affidavits—what they must contain—rule either *nisi* or absolute—two sorts of attachments on a mandatory writ.
- 54. Of the damages and costs. Cases and authorities, § 71, 72, p. (217,) 80, 81.
 - (a) General rule not to give costs.
 - (b) Under Stat. of 9 Anne.
 - (c) “ Rev. Stat. of New York.
 - (d) Cases of costs.

IX. FORMS.

- I. Mandamus to inferior tribunals and judicial officers.
 - 1. A general form of an alternative mandamus which may be adapted (with proper additions,) to any case, court, or officer. p. (217,) 81.
 - 2. Peremptory mandamus thereon. p. (217,) 82.
 - 3. Peremptory mandamus to vacate an order setting aside a *f. fa.* p. (217,) 82.
 - 4. The same to vacate an order setting aside a report of referees. p. (217,) 82.
 - 5. Alternative mandamus to restore an attorney. p. (217,) 82.
 - 6. Peremptory mandamus thereon. *Id.*
 - 7. Alternative mandamus to a court of sessions to hear and determine the appeal against an order of bastardy. p. (217,) 84.
 - 8. Peremptory mandamus thereon. *Id.*
 - 9. Alternative mandamus to two justices to take the examination of a pauper, touching the reputed father of a bastard child. *Id.*
 - 10. Peremptory mandamus thereon. p. (217,) 85.
- II. Mandamus to inferior officers and corporations.

11. Mandamus to one who has the custody of public papers to permit a person to inspect and take copies of the same. *Id.*
12. Mandamus to a late clerk to deliver up books, &c. to the present clerk. p. (217,) 86.
13. Mandamus to compel certain officers, as supervisors, commissioners, &c., to make a road tax or assessment, for repaying sums expended in public works, or for other purposes. p. (217,) 87.
14. Mandamus to compel officers, as commissioners, supervisors, justices, &c., to levy a sum assessed on a certain person pursuant to a statute. *Id.*
15. Mandamus to a person to take upon himself the office of mayor. p. (217,) 88.
16. Mandamus to restore one of the common council of a city. *Id.*
17. Mandamus to elect a mayor. p. (217,) 89.
18. Mandamus to elect an alderman in the place of one who has left the country. p. (217,) 90.

MANDATE.

1. A mere agreement to undertake a trust *in futuro*, without compensation, is not obligatory; but when once undertaken, and the trust actually entered upon, the bailee is bound to perform it according to the terms of his agreement. *Rutgers et al. v. Lucet*, 92.
2. The question whether an action lies for a total failure to perform a gratuitous executory undertaking considered, 95, n. (a.)

MESNE PROFITS.

1. An action for *mesne profits* is an equitable suit, in which every equitable defence may be set up. *Murray v. Gouverneur & Kemble*, 438.
2. Where an entry is followed by an *ouster*, the party can recover damages only for the mere trespass or entry; but if he make a re-entry and lays his action with a *continuando*, he may then recover damages for the *mesne profits* or subsequent acts, as well as for the trespass.

Case v. Shepherd, 27.

MASTER OF SHIP.

See CONSIGNOR AND CONSIGNEE.

MISNOMER.

See ATTAINDER, II. BAIL, IV. 3.

MONEY OF ACCOUNT.

Pounds are not an unknown money of account, and the court will, *ex officio*, take notice of their value. *Johnston v. Hedden*, 274.

MOTION.

See AFFIDAVIT, II. PRACTICE, XXXVI.

NAME.

A man can have but one name of baptism, though he may have two or more surnames. 274, n. (a.)

NATURALIZATION.

Where a subject of a belligerent state emigrates to this country, *flagrante bello*, and becomes naturalized, such naturalization will support a warranty of neutral property, in a policy of insurance; and the assured need not disclose to the insurer the time of his emigration.

Duguet v. Rhinelanders, 476.

Authorities, 479, n. (a) and (b.)

NEW TRIAL.

Where a witness, who was regularly subpoenaed by the defendant, was out of the way when the trial of the cause commenced, and did not appear in court until after the testimony on both sides had closed, and the counsel for the defendant had proceeded to sum up the evidence, and was then offered to be examined, but was refused by the judge, and a verdict was found for the plaintiff; it was held, that the admission of the witness offered was altogether discretionary with the judge, who acted reasonably in refusing to admit him under the circumstances, and that a new trial ought not to be granted. It cannot be claimed as a matter of strict right by either party at a trial, to open the cause to proof after full opportunity has been given to each side to be heard, and the testimony has been regularly, and by mutual consent, closed. Per *Kent, J. Alexander v. Byron*, 318.

Cases, 321, n. (a) and (b.)

NEW YORK, CORPORATION OF.

See VENUE, II.

NOTICE TO QUIT.

See LANDLORD AND TENANT, II.

PARTNERSHIP.

I. *What constitutes—when it does not exist—joint-owners.*

II. Rights of Individual Partners.**III. Action by Surviving Partner.****I. What constitutes—when it does not exist—joint-owners.**

1. To constitute a partnership, there must be a reciprocal choice and agreement of the parties to unite their stock and to share in all risks of profit and loss. They must not only be jointly concerned in the purchase, but jointly concerned in the future sale. Per *Kent, J.*, in

Holmes v. The United Ins. Co., 329.

Cases and authorities, 330, n. (a) and (b.)

2. A policy of insurance was effected on the cargo of a ship from Calcutta to Baltimore, by A. as the agent of B. and for his account. The policy was in the name of A. generally, for 25,000 dollars, as interest might appear. The cargo belonged to B. and four other persons, and was purchased with the proceeds of the outward cargo. B. carried on business for himself, and was unconnected in trade with the other persons, who knew nothing of the insurance. The proportion of the return cargo belonging to B. in fact amounted only to about 13,000 dollars. B. brought an action for a return of premium, for the difference of the sum subscribed to the policy, and the amount of his interest; it was held, that B. and the four others were not partners, and that B. was entitled to recover back the premium for the amount of his interest overvalued in the policy.

Holmes v. The United Ins. Co. 329.

Cases and authorities, 331, n. (c.)

II. Rights of Individual Partners.

3. To insure partnership property. 332, n. (d.)

III. Action by Surviving Partner.

4. A surviving partner may maintain a suit in his own name, for a debt incurred to the partnership after the death of his co-partner, and also where the debt was contracted in the lifetime of the partner.

Bernard v. Wilcox, 374-4.

Cases and authorities, 375, n. (a.)

PATENT.

- A patent for certain lands was granted to A. B. and C. for themselves and their associates, being a settlement of Friends on the west side of Seneca lake, to have and to hold the same to A. B. and C. as tenants in common, and their associates; it was held, that no legal estate vested, except in the three persons named in the patent.

Jackson, ex dem. Potter and others, v. Sisson, 321.

PAYMENT.

A bill of exchange given for a precedent debt is not *payment*, unless expressly agreed so to be by the parties. *Murray v. Gouverneur et al.*, 438.
Cases and authorities, 441, n. (b.)

PENALTY.

In bonds for the performance of covenants and for indemnity, the penalty is not recoverable. Courts of law are invested with an equitable jurisdiction on the subject, and the true question in courts of law, as well as in courts of equity, is now a question of damage. *Quantum damnificatus* is the true point in issue in all such cases. Per *Lansing*, Ch. J.

Dole v. Moulton, 205.

PLEADINGS.

I. *Declaration.*

1. *Amendment.*
2. *Averments in.*
3. *Certainty in.*
4. *Damages in.*
5. *Statement of amount due.*
6. *Surplusage in.*

II. *Pleas.*

1. *Abatement.*
2. *Debt on judgment.*
3. *Nil debet—evidence under.*
4. *Scire facias.*

III. *Non-joinder of Defendants in.*I. *Declaration.*1. *Amendment.*

1. Where a promise, in one of the counts in a declaration, by reference to the day in the preceding count, was laid after the breach assigned, the mistake was held to be cured by the verdict. *Allaire v. Ouland*, 53.

See AMENDMENT OF DECLARATION.

2. *Averments in.*

2. Distinction between impertinent and immaterial, 55, n. (a.)

3. *Certainty in.*

2. Where a declaration commenced thus, "James Hildreth complains of Peter B. and James Harvey, the said James being in custody, &c. and the said Peter being returned not found, of a plea," &c.: it was held to contain

sufficient certainty ; and that J. Harvey, the defendant, and not James H. the plaintiff, was the person in custody, &c.

Hilldretk v. Becker and Harvey, 339.

Authorities, 340, n. (a.)

4. *Damages in.*

4. Where in an action of covenant, or in any action sounding in damages, the plaintiff claims more damages than on the face of his declaration appears to be due, it will not vitiate, especially after verdict for the amount of the damages being ascertained by the jury, it is to be presumed they were assessed according to the proof. Per *Radcliff*, J.

Executors of Van Rensselaer v. Executors of Platner, 17:

5. Where several counts or causes of action are stated, and any one of them is bad, and the damages entire, the court cannot discriminate or give judgment for the whole. So where the right of action accrues periodically, or depends on time, if the plaintiff's declaration embraces a period for which he cannot be entitled to recover, and the damages are entire, it is equally out of the power of the court to distinguish the good from the bad, or to give judgment for the whole. Per *Radcliff*, J. Unless the court have sufficient matter by which to intend that no damages were given for the period when the plaintiff had no right. Per *Kent*, J. *Id.*

5. *Statement of amount due.*

6. A declaration on a bond for 70*l.* stating that the plaintiff demanded the 70*l.* of the value of 175 dollars, lawful money of the state, which the defendant owes and detains, is good. *Johnston v. Hedden*, 274.

6. *Surplusage in.*

7. Where matter is stated in a declaration which might have been struck out on motion, as surplusage, it need not be proved at the trial.

Allaire v. Outland, 52.

Cases and authorities, 55, n. (a.)

II. *Pleas.*

1. *Abatement.*

8. A writ of error pending may be pleaded in abatement to a suit on a judgment ; but the plea must be drawn with precision, and conclude clearly, in abatement, and not in bar. The plea must also state that the writ of error was brought before the action was commenced on the judgment, and must show all those steps taken which are required by law to make it a *superse-deas* ; as, in the present case, that a copy of the writ of error, for the adverse party, had been lodged in the clerk's office, within ten days after the judgment was rendered. *Jenkins v. Pepoon*, 312—2.

Authorities, 313, n. (a.)

2. *Debt on judgment.*

9. To an action of debt on a judgment in the circuit court of the United States, for the district of Massachusetts, the defendant pleaded, that the record of the judgment had been removed, by writ of error, according to law, into

the supreme court of the United States, wherefore he prayed judgment, &c. On demurrer, the plea was held bad. *Jenkins v. Pepoon*, 312-2.

3. *Nil debet*—Evidence under.

10. In an action of debt on a judgment in the supreme court of Pennsylvania, the defendant pleaded *nil debet* and *payment*. It was held, that the plaintiff was bound to produce and prove the record of the judgment, or an exemplification thereof. *Rush v. Cobbett*, 256.

Authorities, 257, n. (a.)

4. *Scire Facias*.

11. In an action of *scire facias* against bail, the defendant pleaded that another person of the same name and description became bail, and traversed that he was the person named in the bail-piece. The name of Elnathan Noble was inserted in the bail-piece, but it was proved that Stephen Norton was the person who intended to be bail, and who, in fact, appeared before the judge who took and signed the acknowledgment on the bail-piece. It was held, that the plea was good; that the evidence was admissible, and sufficient, on the issue joined between the parties, as to the identity of the person. *Renoard v. Noble*, 293.

III. *Non-joinder of Defendants in*.

12. Where there are several persons jointly indebted, or jointly responsible, and all of them are not made defendants, it must be pleaded in abatement, and cannot be taken advantage of at the trial.

Ziele and Becker v. Executors of Campbell, 382.

Cases, 384, n. (a.)

POWER.

See LIMITATION.

PRACTICE.

- I. *Abatement of Suit by Civil Death.*
- II. *Absent and Absconding Debtors.*
- III. *Account.*
- IV. *Administrator.*
- V. *Affidavit.*
- VI. *Amendment of Declaration.*
- VII. *Appearance.*
- VIII. *Argument.*
- IX. *Arrest of judgment.*
- X. *Attachment.*

XI. Attorney.

XII. Bail.

1. *Discharge of.*
 - (a) *By discharge of principal.*
 - (b) *Where Bail have been personated.*
2. *Proceedings against.*
 - (a) *Irregular.*
 - (b) *"Peculiar indulgence."*
 - (c) *Where Bail have been personated.*
 - (d) *Costs in.*
3. *Where Bail are considered as fixed.*

XIII. Case.

1. *Time for making.*
2. *Where opposite Attorney refuses to furnish papers to be inserted.*
3. *Where Verdict taken subject to the Opinion of the Court.*

XIV. Certiorari.

1. *Joinder in Error on.*
2. *Who may move to quash.*

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1. *Affidavit to support motion.*
 - (a) *Who may make.*
 - (b) *What it ought to contain.*
 - (c) *What it ought to contain to justify a stay of proceedings.*
2. *Return of—Diligence.*

XVI. Contempt.

XVII. Costs.

1. *Where relief is discretionary.*
2. *Collection of.*
 - (a) *By attachment.*
 - (b) *By proceeding in suit.*
 - (c) *By denial of exoneretur.*
3. *In debt on Bond.*
4. *In cases of non-resident Plaintiffs.*
When required.
5. *Notice of taxation on whom served.*

XVIII. Damages.

XIX. Debt on Bond.

XX. Declaration, Filing, and Service after Amendment.

XXI. Default.

1. *Against whom entered in ejectment.*

- 2. *Application to set aside.*
 - (a) *What must be shown.*
 - (b) *On what terms.*
 - (c) *In action against Administratrix.*
 - (d) *In action against Bail.*
- XXII. *Demurrer.*
- XXIII. *Ejectment.*
 - 1. *Time to Plead.*
 - 2. *Default.*
 - (a) *When entered.*
 - (b) *Against whom entered.*
- XXIV. *Exoneretur.*
 - 1. *When allowed in case of Insolvent or Bankrupt.*
 - 2. *When allowed upon surrender of principal.*
- XXV. *Forcible Entry and Detainer.*
 - 1. *Rule to assign Errors in.*
 - 2. *Traverse to indictment in.*
- XXVI. *Fraud.*
- XXVII. *Hard Defence—Usury.*
- XXVIII. *Inquest.*
 - 1. *Debt not yet due.*
 - 2. *When not setting aside.*
- XXIX. *Inquisition.*
- XXX. *Irregularity.*
- XXXI. *Joinder in Error.*
- XXXII. *Judgment.*
- XXXIII. *Justice.*
- XXXIV. *Laches.*
- XXXV. *Mandamus.*
 - 1. *To compel a court to do an act.*
 - (a) *To render judgment.*
 - (b) *To sign a Bill of Exceptions.*
 - 2. *Not granted where there is another adequate specific legal remedy.*
 - 3. *Proceedings on.*
- XXXVI. *Motion.*
- XXXVII. *Nol. Pros.*
- XXXVIII. *Order.*
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- XL. *Privilege.*
- XLI. *Real Action.*
- XLII. *Rule.*
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XLIV. *Scire Facias.*XLV. *Service of Papers.*

1. *How served.*
2. *Service on Party.*
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XLVI. *Stay of Proceedings.*XLVII. *Stipulation.*

1. *Generally.*
2. *To try, &c.*
 - (a) *Waiver of.*
 - (b) *What excuses.*
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XLVIII. *Supplemental Affidavit.*XLIX. *Time.*

1. *How obtained.*
2. *Construction of—order giving.*
3. *To make a Case under Rule of 1799.*

L. *Trial by Record.*LI. *Trustees of Absent or Absconding Debtor.*LII. *Use and Occupation.*LIII. *Vacatur.*LIV. *Venue.*

1. *What circumstances will induce courts to change the Venue, on the ground that an impartial trial cannot be had, considered.*
 - (a) *By whom moved.*
 - (b) *When moved.*
 - (c) *Costs of motion.*
2. *Affidavit to change, what it must contain.*
 - (a) *In assumpsit.*
 - (b) *When Plaintiff's Attorney confessed that cause of action arose in another county.*
3. *Counter Affidavits on motion.*
4. *In Debt.*
5. *In Use or Occupation.*
6. *Effect of change in Declaration.*

LV. *Verdict subject to Opinion, &c.*LVI. *Writ of Error.*LVII. *Writ of Right.*I. *Abatement of Suit by Civil Death.*

1. *Where the defendant in a cause is sentenced to the state prison for life, he is considered as civilly dead, and the suit is abated.*

Graham v. Adams and Adams, 408.

Cases and authorities, 408, n. (b.)

II. *Absent and Absconding Debtors.*

See TRUSTEES OF ABSENT AND ABSCONDING DEBTOR.

III. *Account.*

See TRUSTEES OF ABSENT AND ABSCONDING DEBTOR.

IV. *Administrator.*

See DEFAULT.

V. *Affidavit.*

2. On motion for commission. See Commission.
3. Counter on motion. See Motion.
4. On motion to set aside default. See Default.
5. On motion to change Venue. See Venue.
6. To prove service of papers. See Service of Papers.

VI. *Amendment of Declaration.*

7. A declaration was allowed to be amended by increasing the damages in the conclusion, on payment of costs. *Bogart v. M'Donald*, 219.
8. Where a judge's order was obtained to enlarge the time for pleading until the second day of the term, the defendant had until the next day to plead, and a default entered on the second day was irregular.

Thomas v. Douglass, 226.

Authorities, 226, n. (b.)

9. The right to amend generally discretionary, 220, n. (b.)
10. Generally as to the right, 220, n. (b.), § 1, p. (220,) 1-5.
11. Generally as to the statute of amendment, p. (220,) 5, § 2.
12. New cause of action not permitted, p. (220,) 6, § 3.
13. What is a new cause of action, p. (220,) 6, 7, 8.
14. What is not a new cause of action, p. (220,) 8, 9, 10, 11.
15. Change of venue, p. (220,) 11.
16. Change of name or character of the party, p. (220,) 12.
17. Change of the thing demanded, p. (220,) 12.
18. At what time the declaration may be amended, p. (220,) 12, § 4.
19. Before pleas, p. (220,) 12.
20. After plea or demurrer, p. (220,) 13.
21. After notice of trial, p. (220,) 13.
22. After the trial or verdict, p. (220,) 14.
23. After the judgment, p. (220,) 16.
24. Effect of amendment upon the rights of the opposite party, p. (220,) 16, § 5.

See AMENDMENT.

VII. *Appearance.*

See SERVICE OF PAPERS.

VIII. *Argument.*

25. Where a verdict is taken, subject to the opinion of the court on a case stated, the counsel for the plaintiff opens the argument of the cause.

Jackson ex dem. Gansevoort v. Murray, 219.

Cases and authorities, 219, n. (a.)

IX. *Arrest of Judgment.*

26. Where a verdict is found for the plaintiff, and the judgment of the court below is arrested, and the plaintiff wishes to bring a writ of error, the proper course is for the plaintiff to move the court for judgment against himself, and for the defendant, for the insufficiency of the declaration, on which judgment a writ of error will lie, but not on an arrest of judgment.

Fish v. Weatherwax, 215.

See MANDAMUS.

X. *Attachment.*

27. An attachment against a sheriff for not bringing in the body of a defendant, cannot be issued until twenty days after service of a notice of a rule for that purpose. *Stewart v. Williams*, 71.

28. *M'Gourck v. Armstrong*, Supreme Court, April term, 1798, id. note (a.)
Authorities, id. n. (a.)

See CONTEMPT. COSTS.

XI. *Attorney.*

29. Where an attorney is employed, notice must be served on him, not on the party. *Wardell v. Eden*, 121.

Authorities, 121, n. (d.)

See COSTS.

XII. *Bail.*1. *Discharge of.*(a) *By discharge of principal.*

30. Where the principal against whom a commission of bankruptcy had issued was arrested on a *ca. sa.* and discharged, it was held, that the bail was also discharged, and that there was no necessity to enter an *exoneretur* on the bail-piece. *Milner et al. v. Greene*, 283.

Cases and authorities, 284, n. (a) and (b.)

31. Where the principal in a cause had obtained his certificate of discharge under the bankrupt law of the United States before the bail had become fixed, the court ordered an *exoneretur* to be entered on the bail-piece.

Kane and Kane v. Ingraham, 403.

Cases and authorities, 405, n. (a) and (b.)

(b) *Where Bail have been personated.*

See Infra, 2. (c.)

2. *Proceedings against.*

(a) *Irregular.*

32. Where the proceedings against bail were irregular, but they suffered two terms to elapse, after a knowledge of the irregularity, before they applied to set them aside, it was held too late. *Jones v. Dunning and Doe*, 74. Cases and authorities, 74, n. (a.)

(b) *Peculiar indulgence.*

33. In an application to set aside a default for not pleading, bail are not entitled to any peculiar indulgence. *Gorham v. Lansing and Doe*, 107.

(c) *Where Bail have been personated.*

34. Where bail are personated, the court will, in their discretion, on motion, order a *vacatur* of the bail. But if there has been a felonious personating of bail, they will stay any order for relief, until the party personated has prosecuted the felon. *Renoard v. Noble*, 293. Authorities, 296, n. (a.)

(d) *Costs in.*

See Costs.

2. *Where Bail are considered as fixed.*

35. Bail are not considered as fixed, until after eight days in full term after the return of process against them, or within the time allowed for the surrender of the principal. *Kane and Kane v. Ingraham*, 403. Cases and authorities, 405, n. (a) and (b.)

XIII. Case.

1. *Time for making.*

36. The two days allowed by the rule of January term, 1799, for making up a case cannot be enlarged by the order of a judge.

Jackson ex dem. Low v. Hornbeck, 115.

37. Time may be enlarged. Cases and authorities, 115, n. (a.)

2. *Where opposite attorney refuses to furnish papers to be inserted.*

38. Where, after a verdict, and within the two days allowed for making a case, the defendant's attorney applied to the plaintiff's attorney for certain papers which had been read in evidence, which were necessary to be put in the case, which were refused by the plaintiff's attorney, and the defendant's attorney could not, for that reason, make up the case; the court ordered, that the plaintiff's attorney furnish the papers to the defendant's attorney, or permit him to take extracts, and that the proceedings should, in the meantime, be stayed. *Jackson ex dem. Martin v. Platt*, 71.

Cases and authorities, 72, n. (a.)

3. *Where Verdict taken subject to the opinion of the Court.*

39. Made by plaintiff—defendant's remedy, if not made, 219, n. (a) to *Jackson ex dem. Gansevoort v. Murray*.

XIV. *Certiorari*.1. *Joinder in Error on.*

40. Where a rule for a joinder in error, to a *certiorari* is obtained, the party must apply at the next term, for the effect of his rule; if a term intervenes, he will be presumed to have waived the rule. *Sealy v. Shattuck*, 69.
Cases and authorities, 70, n. (b.)

2. *Who may move to quash.*

41. A justice cannot move to quash a *certiorari* directed to him. He must obey it at his peril; and return what is legally required of him, and take no notice of what he is not bound by law to return.
Van Patten v. Ouderkirk, 108.

XV. *Commission*.1. *Affidavit to support motion.*(a) *Who may make.*

42. An affidavit, on which a motion is made for a commission to examine a witness, may be made by a third person, not a party to the writ.
Demar and wife v. Van Zandt, 69.

Cases, 69, n. (a); id. 68, n. (b.)

(b) *What it ought to contain—generally.*

43. The affidavit on which a motion is made for a commission, ought to state that there are material witnesses to be examined at the place to which the commission is to be directed. A general affidavit that material evidence is to be obtained in the cause, is not sufficient.

Franklin v. The United Insurance Company, 68.

Cases and authorities, 68, n. (b.)

(c) *What it ought to contain to justify a stay of proceedings.*

44. A commission to examine witnesses will not be granted, so as to stay the proceedings in the cause, unless the party swears positively that he has a good defence on the merits, and that the witnesses named are material.

Franklin v. The United Ins. Co. 285.

Cases and authorities, 286, n. (a); 68, n. (b.)

45. Commission not a stay of proceedings unless ordered by the court, 70, n. (b.)

2. *Return of—diligence.*

46. Where the party who sues out a commission to examine witnesses, does not use due diligence to get it returned in proper time, or the return is not properly made, the court will permit the trial to proceed, notwithstanding the commission. *Rush v. Cobbett*, 70.

XVI. *Contempt*.

47. Where a person brought a suit in the name of another, without his privity or consent, it was held to be a contempt of the court, and the nominal plain-

tiff being nonsuited, an attachment was granted against the person who brought the suit, for the costs. *Butterworth v. Stagg*, 291.
References, 291, n. (a.)

XVII. Costs.

1. Where relief is discretionary.

48. Where the demandant in a real action, enters into a stipulation to try the cause, or be nonsuited, he must pay the costs of the last circuit or sittings, in the same manner as plaintiffs in other causes, for not proceeding to trial. *Phillips v. Peck*, 104.

2. Collection of.

(a) By attachment.

49. Where the trial of a cause is put off, on payment of costs, the plaintiff may demand the costs immediately, and if not paid, may proceed in the cause, or he may have the costs regularly taxed on due notice, and if after service of the taxed bill, the costs are not paid, he may take out an attachment *instante*.

Jackson, ex dem. Lewis and others, v. Larroway, 114.
Cases and authorities, 115, n. (a.)

(b) By proceeding in suit.

50. Where a party agreed to stay proceedings in a bail-bond suit, on payment of costs, the original suit having been settled, and the defendant neglecting to pay the costs, the plaintiff proceeded in the bail-bond suit, the court refused to set aside the proceedings, as the plaintiff had no other way to obtain his costs. *Campbell v. Grove*, 105.
Cases and authorities, 106, n. (a.)

(c) By denial of Exoneretur.

51. If the principal be surrendered pending the suit by *scire facias* against the bail, an *exoneretur* will not be allowed, until the costs of the proceedings against bail are paid. *Parker v. Tomlinson*, 220-18.
Authorities, 220-18, n. (a.)

3. In Debt on Bond.

See DEBT.

4. In cases of non-resident Plaintiffs.

When required.

109, n. (b.)

52. Where there were two plaintiffs in a cause, one of whom resided out of the state, and the other within the state, and the plaintiff within the state died

pending the suit, and the defendant obtained judgment, it was held that the attorney of the plaintiffs was not bound to pay the costs.

Jackson v. Powell, 67.

Authorities, 67, n. (a.)

53. The attorney is not bound to file security for costs, where one of the plaintiffs resides in the state, though he may be insolvent.

Pfister and M'Comb v. Gillespie, 109.

See 109, n. (b.)

5. *Notice of taxation, on whom served.*

54. Notice of taxing costs must be served on the attorney, not on the counsel.

Jackson, ex dem. Lewis v. Larroway, 114.

Cases and authorities, 114, n. (b.)

XVIII. *Damages.*

See DEBT ON BOND.

XIX. *Debt.*

1. *On bond.*

55. In an action of debt on a bond conditioned for the performance of covenants, the plaintiff must assign *breaches*, and have the damages assessed, and may then enter judgment for the penalty *pro forma*, and issue execution for the damages and costs; and if the damages are assessed at *six cents*, he will be entitled to nominal damages for the detention of his debt, and may enter up judgment for the penalty so as to recover full costs.

Hodges v. Suffelt, 406.

Cases and authorities, 407, n. (a.)

2. *On judgment.*

See VENUE.

XX. *Declaration, Filing, and Service after Amendment.*

56. After a rule to change the venue, the plaintiff entered a default for want of a plea, without altering the declaration filed, or filing a new declaration and delivering a copy; and it was held irregular.

Thomas v. Douglass, 226.

Authorities, 226, n. (b.)

XXI. *Default.*

1. *Against whom entered in Ejectment.*

See EJECTMENT, *infra*.

2. *Application to set aside.*(a) *What must be shown.*

57. A default for not pleading, will be set aside on an affidavit of merits, if the defendant also shows a satisfactory excuse for not pleading.

M Kinstry v. Edwards, 113.

Cases and authorities, 113, n. (b.)

See *Infra*, (c.)

(b) *On what terms.*

Cases and authorities, 113, n. (b.)

(c) *In action against Administratrix.*

58. Where a judgment by default was regularly obtained against an administratrix, she was allowed to come in and plead, upon showing a sufficient excuse; but the judgment was directed to stand as security for the *assets* remaining after payment of prior judgments confessed, and for *assets quando acciderint*. *Nitchie v. Smith*, 286.

Cases and authorities, 287, n. (a.)

(d) *In action against Bail.*

59. In an application to set aside a default for not pleading, bail are not entitled to any peculiar indulgence. *Gorham v. Lansing and Doe*, 107.

XXII. *Demurrer.*

60. After rule for judgment on a demurrer, it is too late to apply, at the next term, for leave to withdraw it. *Seaman v. Haskins*, 284.

Cases and authorities, 284, n. (a.)

XXIII. *Ejectment.*1. *Time to Plead.*

61. In ejectment, the tenant must plead at the time he signs the consent rule. *Jackson ex dem. Van Alen v. Vischer*, 106.

References, 107, n. (a.)

See *Infra*, 2.

2. *Default.*(a) *When entered.*

62. In ejectment, signing the consent rules, delivering a new declaration, putting in common bail and filing a plea are all simultaneous acts. And if the tenant neglects to file the plea *instantly*, default may be entered against the casual ejector. *Jackson ex dem. Quackenboss v. Woodward*, 110.

Cases and authorities, 110, n. (b.)

(b) *Against whom entered.*

63. A default for want of a plea, must be entered against the casual ejector, not the tenant. *Jackson ex dem. Van Alen v. Vischer*, 106.

References, 107, n. (a.)

See *Supra*, (a.)

XXIV. *Exoneretur.*

1. *When allowed in case of insolvent or bankrupt.*

284, n. (b.)

See BAIL.

2. *When allowed upon surrender of principal.*

See *COSTA*.

XXV. *Forcible Entry and Detainer.*

1. *Rule to assign errors in.*

64. An indictment for a forcible entry and detainer before two justices, having been removed by *certiorari* to this court, the defendants were served with a notice of a rule to assign errors in twenty days, and no assignment being made, a judgment by default was entered; and the defendants afterwards filed their plea. It was held, that the rule to assign errors was a nullity, and the judgment and all subsequent proceedings were set aside for irregularity. *The People ex rel. Quackenboss v. Burtch*, 400.

Authorities, 402, n. (b)

2. *Traverse to indictment in.*

See 400, n. (a.)

XXVI. *Fraud.*

See SATISFACTION.

XXVII. *Hard Defence—Usury.*

65. Where the attorney for the defendant suffered an inquest to be taken by default at the sittings, supposing there was no defence, the court refused to set aside the default, to let the defendant in, to show usury as a defence.

Crammond v. Roosevelt, 282.

Authorities, see 283, n. (a.)

XXVIII. *Inquest.*

1. *Debt not yet due.*

66. Where an action was commenced before the debt was due, and an inquest was taken by default, the court refused to set aside the verdict, as the defendant admitted the debt to be due, at the time of making the application to set aside the verdict. *Lawrence v. Bowne*, 225.

2. *When not setting aside.*

See HARD DEFENCE, *Supra*, XXVII. 1.

XXIX. *Inquisition.*

See STIPULATION.

XXX. *Irregularity.*

67. Setting aside proceedings for, 74, n. (a.)

See Tit. AFFIDAVIT.

XXXI. *Joinder in Error.*

See CERTIORARI.

XXXII. *Judgment.*

See DEFAULT. DEFT.

XXXIII. *Justice.*

See CERTIORARI.

XXXIV. *Laches.*

See BAIL. CERTIORARI. COMMISSION.

XXXV. *Mandamus.*1. *To compel a Court to do an act.*(a) *To render judgment.*

68. If the court below refuses to give a judgment, on the prayer of a party, this court will grant a *mandamus* to compel them to give judgment.

Fish v. Weatherwax, 215.

For cases and authorities, see p. 217, n. (b.)

(b) *To sign a bill of exceptions.*

69. If a court of common pleas, without sufficient ground, refuse to seal a bill of exceptions, it is a contempt, and this court will award a *mandamus* to compel them to sign it.

People ex rel. Allaire v. Judges of Westchester, 118.

Cases and authorities, 118, n. (b) ; 217, n. (b.)

2. *Not granted where there is another adequate specific legal remedy.*

70. Where the plaintiffs, who were administrators in a cause in the court of common pleas, recovered less than twenty-five dollars damages, and that court gave judgment for the damages, but not for the costs, this court refused to grant a *mandamus* to compel them to give judgment for the costs. The proper remedy is by a writ of error. *Jansen et al. v. Davison*, 72.

Cases and authorities, 73, n. (a.) See also, 217, n. (b.)

3. *Proceedings on.*

71. Where a court of common pleas refuses to give judgment in a cause be-

fore them, this court will not grant a *mandamus*, until after a rule to show cause has first been granted for the purpose.

The People v. The Judges of Cayuga, 68.

Cases and authorities, 68, n. (a.) ; 217, n. (b.)

See MANDAMUS.

XXXVI. Motion.

72. Counter affidavits may be read to oppose a motion, though copies have not been served. *Campbell v. Grove*, 105.

Cases and authorities, 106, n. (a.)

XXXVII. Non Pros.

73. Where the plaintiff does not declare within the time required by the statute, the defendant cannot enter a judgment of *non pros.* without having previously entered a rule for the plaintiff to declare, and served him with a notice of such rule. *Gilbert v. Field*, 292.

Authorities, 292, n. (a.)

XXXVIII. Order.

See RULE. TIME.

XXXIX. Plea.

74. If a party wants time to plead, he must apply to a judge for that purpose. *Gorham v. Lansing and Doe*, 107.

See EJECTMENT. FORCIBLE ENTRY AND DETAINER.

XL. Privilege.

75. A member of congress is privileged from arrest only while at congress, or actually going to, or returning from congress. *Lewis v. Elmendorf*, 222.

76. The privilege of members of congress, of the legislature, and of parliament, considered, 222, n. (a.)

XLI. Real Action.

See WRIT OF RIGHT.

XLII. Rule.

77. A rule regularly obtained, in absence of the counsel for the other party, will not be vacated at a subsequent term. *Hildrith v. Harvey*, 221.

Authorities, 221, n. (a.)

XLIII. Satisfaction.

78. Where the plaintiff after he had assigned a judgment to a third person,

entered up satisfaction on the record, the court on motion, ordered the entry of satisfaction to be vacated. *Wardell v. Eden*, 121.
Cases and authorities, 121, n. (a.)

XLIV. *Scire Facias*.

See *CORRS*.

XLV. *Service of Papers*.

1. *How served*.

79 An affidavit of service on a clerk of the attorney, must state that the clerk was, at the time, in the office of the attorney.

Paddock v. Beebe, 117.

Authorities, 117, n. (a.)

2. *Service on party*.

80. Where the defendant gives notice of bail, in *propria persona*, and the plaintiff serves him with a copy of the declaration and notice of rule to plead, and the defendant afterwards retains an attorney, the plaintiff need not serve another copy of the declaration and notice on the attorney.

Haskins v. Snowden, 287.

Case, 288, n. (a.)

3. *On Attorney*.

See *CORRS*.

XLVI. *Stay of Proceedings*.

See *CASE. COMMISSION. CORRS*.

XLVII. *Stipulation*.

1. *Generally*.

81. If parties agree that the sheriff may admit any evidence, on a writ of inquiry before him, which could have been given on a trial, the court will not set aside the inquisition, because improper evidence had been received or proper evidence rejected by the sheriff. *Sharp v. Dusenbury*, 117.

2. *To try, &c.*

(a) *Waiver of*.

82. Where the plaintiff stipulates to try the cause at the next circuit court, but does not, and the defendant neglects to move for judgment as in case of nonsuit, at the next term after the default, it is a waiver of the default; and the plaintiff will be entitled to stipulate anew, if the motion is made at a subsequent term. *Haskins v. Sebor*, 217—91.

Authorities, 217—91.

(b) *What excuses*.

83. Where a material witness for the plaintiff unexpectedly went abroad, so

that he could not be subpoenaed at the trial, it was held a sufficient excuse for the plaintiff, for not proceeding to trial pursuant to his stipulation.
Nixen v. Hallett and Bourne, 218.

Authorities, 218, n. (a.)

3. *Costs of.*

See WRIT OF RIGHT.

XLVIII. *Supplemental Affidavit.*

See MOTION.

XLIX. *Time.*

1. *How obtained.*

See PLEA.

2. *Construction of order giving.*

84. Where a judge's order was obtained to enlarge the time for pleading until the second day of the term, the defendant had until the next day to plead, and a default entered on the second day was irregular.

Thomas v. Douglass, 226.

Authorities, 226, n. (b.)

3. *To make a case under rule of 1799.*

See CASE.

L. *Trial.*

Practice in.

85. Where a witness, who was regularly subpoenaed by the defendant, was out of the way when the trial of the cause commenced, and did not appear in court until after the testimony on both sides had closed, and the counsel for the defendant had proceeded to sum up the evidence, and was then offered to be examined, but was refused by the judge, and a verdict was found for the plaintiff; it was held, that the admission of the witness offered was altogether discretionary with the judge, who acted reasonably in refusing to admit him under the circumstances, and that a new trial ought not to be granted. It cannot be claimed as a matter of strict right by either party at a trial, to open the cause to proof after full opportunity has been given to each side to be heard, and the testimony has been regularly, and by mutual consent, closed. Per *Kent, J. Alexander v. Byron*, 318.

LI. *Trial by Record.*

86. A trial by record is to be brought on by motion, pursuant to a notice of four days, as in other special motions. *Knapp v. Mead*, 111.

87. Non-enumerated motion—how brought on—abolished, 112, n. (c.)

LII. *Trustees of Absent or Absconding Debtor.*

88. The trustees of an absent or absconding debtor, may be compelled to account on the motion of the debtor, as well as of the creditors.

In the matter of Cascaden, 107.

89. Trustees agents of all parties, 107, n. (c.)

LIII. *Use and Occupation.*

See VENUE.

LIV. *Vacatur.*

See BAIL.

LV. *Venue.*

1. *What circumstances will induce Courts to change the Venue on the ground that an impartial trial cannot be had, considered.*

116, n. (b.)

(a) By whom moved. *Id.*

(b) When moved. *Id.*

(c) Costs of motion. *Id.*

2. *Affidavit to change, what it must contain.*

(a) *In assumpsit.*

90. In an action of *assumpsit*, the venue will not be changed on the general affidavit. *Wheaton v. Slosson*, 111.

Authorities, 111, n. (a.)

(b) *Where Plaintiff's Attorney confessed that cause of action arose in another county.*

91. An affidavit to change the venue made by the defendant's attorney, stating that the plaintiff confessed that the cause of action arose in another county, is sufficient. *Scott v. Gibbs*, 116.

3. *Counter affidavit on motion.*

92. A counter affidavit of the plaintiff, that he believed he could not have a fair trial, &c. is not enough; it ought to state the facts on which the belief is founded. *Scott v. Gibbs*, 116.

Cases and authorities, 116, n. (b.)

4. *In Debt.*

93. An action of debt in this court, on a judgment in a court of common pleas, is a local action; and the venue must be laid in the county where the judgment was given. *Barnes v. Kenyon*, 381.

Overruled cases and authorities, 382, n. (a.)

5. *In Use and Occupation.*

94. An action for use and occupation is not *local* in its nature, being founded in privity of contract and not in privity of estate.

Corporation of New York v. Dawson, 335.

Authorities, 336, n. (b.)

6. *Effect of change in Declaration.*

See DECLARATION.

LVI. *Verdict subject to opinion, &c.*

See ARGUMENT.

LVII. *Writ of Error.*

See ARREST OF JUDGMENT.

LVIII. *Writ of Right.*1. *Appearance.*

95. The tenant in a writ of right may be called on the first day of the term, and his default entered for his non-appearance, and if he does not appear on the *quarto die post*, and excuse his default, he will be nonsuited.

Swift v. Livingston, 112.

Authorities, 113, n. (b.)

2. *Summons.*

96. Where the tenant on a writ of right, vouches, and a writ of summons issues, which is irregular in its service, or defective in the return, an *alias summons* will be granted against the vouchee.

Scofield and wife v. Loder, 75.

3. *Stipulation to try.*

97. Where the demandant in a real action, enters into a stipulation to try the cause, or be nonsuited, he must pay the costs of the last circuit or sittings, in the same manner as plaintiffs in other causes, for not proceeding to trial.

Philips v. Peck, 104.

PREMIUM.

If property be insured to a larger amount than the real value, the overplus premium is recoverable by the assured, because the insurer shall not receive the price of a risk which he has not run. Per *Kent*, J.

Holmes v. The United Ins. Co. 329.

Cases and authorities, 330, n. (a.)

See INSURANCE.

PRINCIPAL AND SURETY.

See SURETY.

PRIVILEGE.

1. A member of congress is privileged from arrest only while *at congress*, or *actually going to*, or *returning from congress*.
Lewis v. Elmendorf, 222.
2. The nature and extent of this privilege, considered, 222, n. (a.)

PURCHASER.

Where A. contracted to sell a house and lot to B., and C. purchased of B. all his right, &c. it was held, that C. though a *bona fide* purchaser, without notice, must take the property subject to all the equity existing between the original parties, A. and B. *Murray v. Kemble et al.* 438.
Cases, 441, n. (c.)

RECORD.

Enrolment of deed binds, though procured by fraud, 294, n. (a.)

REFERENCE.

- I. *When granted.*
- II. *Duties of Referees—adjournment.*

I. *When granted.*

1. A reference of a cause will not be granted, if it appears that law questions will arise. *De Hart v. Covenhoven*, 402.
Cases and authorities, 402, n. (a) and (b.)

II. *Duties of Referees—adjournment.*

2. If referees in a cause, unreasonably refuse an adjournment, requested by a party, to enable him to produce witnesses, the report will be set aside.
Forbes v. Frary, 224.
Authorities, 225, n. (a.)

REMAINDER.

See DEVISE, I. 1. LIMITATION.

RENT.

See COVENANT, I. 1, 2.

REPRESENTATION.

If a person proceeds upon the information of another to do an act in his fa-

vor, the person in whose favor the act is to be done, is bound, at his peril to see that the information given is correct. *Faugier v. Hallett*, 233.

See INSURANCE.

REVERSION.

See COVENANT, I. 1, 2.

RIGHTS.

The division of an empire works no forfeiture of a right previously acquired. *Kelly v. Harrison*, 29.

SALE.

- I. *Conditional—right to rescind.*
- II. *Liability of trustee vendors.*
- III. *Title taken by bona fide purchaser.*

I. *Conditional—right to rescind.*

1. A. purchased a negro slave of B. for 200 dollars, for which he gave B. his bill, payable in five months; and it was agreed between the parties, that if A. or his wife did not like the slave, B. would take him back, if he was returned any time within five months, and refund the purchase money. A. offered to return the slave within the five months, and B. refused to take him or to refund the money. A. having paid the bill, brought an action against B. to recover the amount of the purchase money; and it was held that A. was entitled to recover the amount, as damages for the non-performance of the agreement. *Giles v. Bradley*, 253.

Cases and authorities, 256, n. (a.); 254, n. (a.)

II. *Liability of trustee vendors.*

2. Where the trustees of an absconding debtor, appointed under the act, sold his lands, and gave a deed conveying all the debtor's right and title, and the purchaser was evicted of a part of the land, it was held, that the trustees were not liable to refund any part of the purchase money.

Trustees and persons acting in *auter droit*, are not responsible, unless there be fraud or an express warranty.

Murray v. The Trustees of the Ringwood Company, 278.

III. *Title taken by bona fide purchaser.*

3. Where A. contracted to sell a house and lot to B., and C. purchased of B. all his right, &c. it was held, that C. though a *bona fide* purchaser, without

notice, must take the property subject to all the equity existing between the original parties, A. and B. *Murray v. Gouverneur*, 438.

Cases and authorities, 441, n. (c.)

SATISFACTION.

A. being indebted to B. in the sum of 1785 dollars, for goods sold and delivered, and to other creditors, on the 1st of January, 1793, executed a bond to C. and D. for 22,500 dollars, for and on account of all his debts, and including the sum due to B. on which bond a judgment was entered in April, 1793. Afterwards, on the 18th of July, 1793, A. gave B. a single bill for the 1785 dollars; and on the 1st of August, 1793, B. affirmed the trust in C. and D. as to the judgment, and on the 2d of August, directed a *ca. sa.* to be issued on the judgment, on which A. was taken into custody, and afterwards, by consent of B. was discharged. In an action brought by B. on the single bill against A. it was held, that B. having as a *cestuy que trust* of the judgment, affirmed the trust, and elected to proceed on the judgment, and to obtain satisfaction of his debt; the single bill was thereby discharged. *Seaman v. Haskins*, 195.

Cases and authorities, 198, n. (a.)

SERVICE OF PAPERS.

See PRACTICE.

SET-OFF.

Where a person was convicted by the act of forfeiture and attainder, passed the 22d October, 1779, of adhering to the enemies of the state and all his property, real and personal, declared to be forfeited, it was held, that he could not, after his return to the state in 1791, set-off rent against a demand of a plaintiff, in an action against him, which accrued prior to the 20th October, 1779. *Sleght v. Kane*, 236.

SHELLY'S CASE—RULE IN.

See 400, n. (c.)

SHERIFF.

I. *Escape.*

II. *Bond to remain faithful prisoner.*

III. *Bond for ease and favor.*

I. *Escape.*

1. Where a defendant is taken in execution, and the sheriff suffers the prisoner voluntarily to escape, he cannot afterwards retake or detain him, without a new authority from the plaintiff.
2. All his legal control over the prisoner ceases by his own wrong, and no act of

his, and no assent of the prisoner, with whom he must be deemed in collusion, can help him. Per *Kent, J.*

3. Nor will the voluntary return or assent of the prisoner, prevent his liability for the escape.
4. After a voluntary escape the sheriff cannot lawfully retake or detain a prisoner, though he may after a negligent escape.
5. But so far as the plaintiff is concerned, he shall never suffer for the sheriff's default; and there is, therefore, no difference whether the escape is *voluntary* or *tortious*, and he has the same remedies in the former as in the latter case. The law gives him the election to charge the sheriff, or pursue the defendant with fresh process; and if the defendant has voluntarily put himself in prison again, instead of fresh process, which would be useless, he may detain him, by affirming him to be again in execution. Per *Kent, J.* and *Benson, J.*
6. The common law in relation to voluntary escapes before the stat. 8 and 9 Wm. III. ch. 27, and the effect of that statute considered by *Radcliff, J.* and *Kent, J.* *Lansing v. Fleet*, 3.

See ESCAPE.

II. Bond to remain faithful prisoner.

7. A bond taken by the sheriff, that a person in execution shall remain a true and faithful prisoner, is valid. *Dole v. Bull and Porter*, 239.

III. Bond for ease and favor.

8. If a bond be taken by the sheriff for the ease and convenience of the prisoner, so that he may go at large within the walls of the prison, and conditioned that he shall remain a true and faithful prisoner, it is not a bond for ease and favor, nor void, though not taken in the manner directed by the act relative to jail liberties. *Dole v. Bull and Porter*, 239.
9. A bond taken by the sheriff to induce a less rigorous imprisonment is good, if the indulgence be such as he would otherwise, consistently with his duty, be authorized to grant; but, if it confer a privilege inconsistent with his duty by which the object of the imprisonment, as a means to compel a satisfaction of the plaintiff's demand, may be impaired or defeated, the bond is illegal and void. Per *Radcliff, J.* *Id.*

See JAIL LIBERTIES.

SLAVES, ACT CONCERNING.

1. A. the owner of a slave in New Jersey, removed into this state with the slave, and entered into an agreement with B. in this state, by which he put the slave to service to B. until the parties or their executors should mutually agree to annul the agreement. This was held to be a sale of the slave in this state, within the intent and meaning of the act concerning slaves passed the 22d of February, 1788. *Sable v. Hitchcock*, 78.
2. But such an agreement or sale, if in the course of administration, or by persons acting in *auter droit*, as executors, assignees of absent or insolvent

debtors, sheriffs on execution, and trustees would not be within the act, so as to subject the vendor to the penalty, or make the slave free. *Id.*

This cause was *affirmed* in the court of errors, p. 488.

3. Where a slave, aged twenty-five years, ran away from his master in New Jersey, and came to New York, and his master came to New York and there entered into an agreement by which he let the slave to a person in New York for twenty years, for the consideration of 225 dollars; giving full power to correct, imprison, and exercise all the authority over the slave which the master could lawfully do; it was held to be an importation and sale within this state, within the meaning of the act of 22d February, 1788, concerning slaves, and that the slave was, therefore, free.

Fish v. Fisher, 89.

SPRINGFIELD PATENT.

What is the true construction of the patent of Springfield? The third course given in the description is to be run so as to strike the Otsego lake at the nearest point, at the *distance* given, without regard to the *course* taken; and so as to preserve the subsequent course. *Jackson v. Carey*, 349.

STALE DEMAND.

See CHANCERY. JUDGMENT. STATUTE. SLAVES, ACT CONCERNING.

STATE SOVEREIGNTY.

The individual states having submitted their territorial claims to the *judiciary* of the United States are to be so far considered as having ceded their sovereignty, and as corporations; and their right to transfer land must be judged of by the same rules of common law as the rights of other persons, natural or politic. *Woodworth and another v. Jones and others*, 417.

STOCK CONTRACT.

See GUARANTY.

SUBROGATION.

See SURETY.

SURETY.

I. *When the relation exist.*

II. *Right of Subrogation.*

I. *When the relation exist.*

1. A. and B. partners in trade, having dissolved their partnership, B. took the property, and engaged to pay off all the debts due by the partnership, among which was a judgment against A. and B. at the suit of C. B. having become insolvent, C. threatened to take out execution against A. who paid the amount of the judgment, and C. agreed that A. might have the benefit of the judgment, to recover the amount out of the property of B, in the name of C. A. sued out execution against the land of B., which was bound by the judgment; B. assigned all his property to D. and others, for the benefit of his creditors, and it was held that A. was to be considered merely as a surety of B., and entitled to an equitable lien on the property of B., and that D. and others, to whom it was assigned, took it, subject to such equitable lien. *Waddington v. Vredenberg*, 227.

II. *Right of Subrogation.*

2. Principle and reason of, (231,) 1, n. (a.)
3. Provisions of the Codes Napoleon, of Austria, Prussia, Sardinia, Bavaria, and the Canton du Vaud, (231,) 2.
4. The Roman law, (231,) 2.
5. Whether creditor who has been paid can transfer rights of action, (231,) 3.
6. Roman law. *Id.*
7. English and American rule. *Id.* and (231,) 4.
8. Surety does not take the place of purchaser of the securities transferred, (231,) 5.
9. Right of subrogation exists whether surety knew of the security or not, (231,) 5, 6.
10. Rule where securities have become impaired or lost in the creditor's hands, (231,) 6.
11. Civil law. *Id.*
12. Securities must have been deposited, assigned or made chargeable in respect of the same transaction in which the surety became liable. *Id.*
13. Civil law. *Id.*
14. They must be of such a nature as continue to exist, and do not get back upon payment to the person of the principal debtor, (231,) 3, 4, 7.
15. Payment must be of the whole debt, (231,) 7.
16. Creditor is entitled to indemnity against costs and expenses of securities chargeable against him. *Id.*
17. Surety of a surety not entitled to the right. *Id.*

SUSQUEHANNAH LANDS.

1. Where notes were given for the purchase money, on a contract for the purchase and sale of Susquehanna lands, within the jurisdiction of Pennsylvania, under the Connecticut claim to those lands; it was held that the sale was illegal, and the consideration void. *Whitaker v. Cone*, 58.
2. A. claiming title under the Connecticut Susquehanna Company to land situate in the state of Pennsylvania, and claimed by that state, sold the land

to B. who gave his notes for the purchase money, part of which was paid; and A. executed to B. a *quit-claim* deed for the land. B. afterwards filed his bill in chancery, praying that A. might be perpetually enjoined from assigning the notes, or proceeding at law to recover the amount; and that the money paid might be refunded; it was held, that the sale was *maintenance*, in selling a *pretended* title, and that both parties being *in pari delicto*, a court of equity would not relieve either; and the bill was, therefore, dismissed. *Woodworth and Rathbun v. Jones and others*, 417.

TAVERN KEEPERS.

See ACT TO LAY A DUTY ON STRONG LIQUORS, &c.

TESTAMENT.

See WILL.

TITLE, BUYING AND SELLING PRETENDED

1. Buying and selling lands out of the possession of the vendor, and held adversely at the time, is buying and selling a pretended title, and is not a valid consideration for a promise. It is a species of maintenance and void on general principles of law and public policy.

A sale by one state of lands within the jurisdiction and under the adverse claim of another state, must be judged by the same principles of law as a sale by an individual.

Therefore where notes were given for the purchase money, on a contract for the purchase and sale of Susquehannah lands, within the jurisdiction of Pennsylvania, under the Connecticut claim to those lands; it was held, that the sale was illegal, and the consideration void. *Whitaker v. Cone*, 58.

2. General principles in reference to what constitutes the offence, 60, n. (b.)

a. The estate sold or purchased should be a *legal* as contradistinguished from an *equitable* estate. *Id.*

b. The purchase should be made from some person other than the state. *Id.*

c. The sale should not be judicial. *Id.*

d. The land should be held adversely. *Id.*

e. The party charged with the offence should have knowledge of such adverse holding. *Id.*

See SALE.

TRESPASS QUARE CLAUSUM FREGIT.

I. *Where it lies.*

II. *Damages in.*

I. *Where it lies.*

1. Where a justice, after a *certiorari* from this court was delivered to him,

proceeded to try the issue of traverse on an indictment under the act to prevent forcible entries and detainers, and the defendant being found guilty, the writ of restitution was issued, and the defendant turned out of possession, it was held, that the proceedings of the justice, after the *certiorari*, were *coram non judice*, and void, and that the justice was liable to an action of trespass. *Case v. Shepard*, 27.

Cases and authorities, 29, n. (a) ; 28, n. (a.)

II. *Damages in.*

2. Where an entry is followed by an *ouster*, the party can recover damages only for the mere trespass or entry ; but if he make a re-entry and lays his action with a *continuando*, he may then recover damages for the *mesne profits* or subsequent acts, as well as for the trespass.

Case v. Shepard, 27.

TRIAL.

Where a witness, who was regularly subpoenaed by the defendant, was out of the way when the trial of the cause commenced, and did not appear in court until after the testimony on both sides had closed, and the counsel for the defendant had proceeded to sum up the evidence, and was then offered to be examined, but was refused by the judge, and a verdict was found for the plaintiff ; it was held, that the admission of the witness offered was altogether discretionary with the judge, who acted reasonably in refusing to admit him under the circumstances, and that a new trial ought not to be granted. It cannot be claimed as a matter of strict right by either party at a trial, to open the cause to proof after full opportunity has been given to each side to be heard, and the testimony has been regularly, and by mutual consent, closed. Per *Kent, J. Alexander v. Byron*, 318.

Cases and authorities, 331, n. (b.)

See INDICTMENT. JURY. PRACTICE.

TROVER.

Where A. shipped goods by B. the master of a vessel at London for New York, and the consignee assigned the bill of lading to C. who demanded the goods and tendered a sum of money for the freight, but whether enough did not appear ; B. refused to deliver the goods, assigning as a reason that he was ordered by the ship-owners not to deliver them, and made no objection as to the tender of the freight ; in an action of trover against B. it was held, that he had waived any tender of the freight ; and that his refusal was evidence of a conversion. *Judah and others v. Kemp*, 411.

Cases and authorities, 412, n. (b.)

TRUSTEES.

Trustees and persons acting in *auter droit*, are not responsible, unless there be fraud or an express warranty.

Murray v. The Trustees of the Ringwood Company, 278.

USE AND OCCUPATION.

An action for use and occupation is not *local* in its nature, being founded in privity of contract and not in privity of estate.

Corporation of New York v. Dawson, 335.

Authorities, 336, n. (b.)

USURY.

I. *What is.*II. *Feigned issue to try question of.*III. *Defence of.*I. *What is.*

1. A. made a note payable to B. which was indorsed by him, and C. and D. and sent by A. to E. a money broker, in order to raise money, and E. advanced the money on the note, deducting a premium of two per cent a month. In an action brought against B. the first indorser, by G. it was held, that the note was usurious and void.
2. Also, that E. the broker, was an admissible witness on the part of the plaintiff, to prove that the note had been sold for no more than the legal interest to F. *Jones v. Hake*, 60.
3. A. residing in the state of Massachusetts, and owning lands in this state, entered into a contract in that state with B. residing in this state, for the sale of lands to him. B. gave A. his bond for the consideration money payable in four years, and also four promissory notes, payable in one, two, three and four years, for the interest on the bond, at the rate of six and a half per cent. and A. executed a bond to B. conditioned to execute to him a conveyance for the land, on payment of the bond and notes. An action was brought by A. against B. in this court, on three of the notes, to which the defendant pleaded usury.

Whether the notes were usurious? *Quære.* And whether the law of Massachusetts or of this state is to govern? *Quære.*

Van Schaick v. Edwards, 355.

See 370, n. (c.)

II. *Feigned issue to try question of.*

4. The proper way to try the truth of the allegation of usury, in regard to a judgment, entered upon a bond and warrant of attorney, is to retain the judgment, and award a feigned issue to try the fact; but where the judgment had been assigned to a *bona fide* purchaser, and notice thereof given to the defendant, the court refused to award an issue, considering a judgment as not within the words of the statute against usury, and having reason to suspect *collusion* between the plaintiff and the defendant, to defeat the claims of of the assignee of the judgment. *Wardell v. Eden*, 258.
5. Where there is color for the allegation that a bond on which a judgment has been entered up on a warrant of attorney is usurious, the court will award a feigned issue to try the fact. *Gilbert v. Eden*, 280.

II. *Defence in.*

6. Where the attorney for the defendant suffered an inquest to be taken by default at the sittings, supposing there was no defence, the court refused to set aside the default, to let the defendant in, to show usury as a defence.
Crammond v. Roosevelt, 282.

Authorities, 282, n. (a.)

VARIANCE.

Where a cause in the common pleas had been referred, and a judgment was entered for ninety-nine cents more than the sum reported by the referees to be due, the judgment, on a writ of error, was reversed.

Stafford v. Van Zandt, 66.

VENUE.

- I. *Local.*
- II. *Transitory.*
- III. *When changed.*

I. *Local.*

1. An action of debt in this court, on a judgment in a court of common pleas, is a local action ; and the *venue* must be laid in the county where the judgment was given. *Barnes v. Kenyon*, 381.

This case reversed, see 382, n. (a.)

II. *Transitory.*

2. An action for use and occupation is not local in its nature, being founded on privity of contract, and not on privity of estate.

Corporation of New York v. Dawson, 335.

Cases and authorities, 336, n. (b.)

III. *When changed.*

3. In an action of *assumpsit*, the venue will not be changed on the general affidavit. *Wheaton v. Slosson*, 111.

Authorities, 111, n. (a.)

4. The *venue* in a cause in which the corporation of New York was a party, was laid in the city of New York ; and the court refused to change it,

merely on that account, on the bare allegation that an impartial trial could not be had in the city and county of New York.

Corporation of New York v. Dawson, 335.

Authorities, 336, n. (a.)

3. When venue will be changed on ground that impartial trial cannot be had. 116, n. (b.)

See AFFIDAVIT. PRACTICE.

VERDICT.

I. *What a good Verdict.*

II. *What cured by.*

I. *What a good Verdict.*

1. A. and B. being indicted for a conspiracy to defraud C. the jury found a verdict that there was an agreement between A. and B. to obtain money from C., but with an intent to return it again; this was held not to be a verdict of acquittal, or a verdict on which any judgment could be given.
The People v. Olcott, 301.

II. *What cured by.*

2. Where a promise in one of the counts in a declaration, by reference to the day in the preceding counts, was laid after the breach assigned, the mistake was held to be cured by the verdict. *Allaire v. Ouland*, 52.

WILL, CONSTRUCTION OF.

1. In an action brought by A. against an executor for a legacy, the defendant offered in evidence an account, and certain bonds which had been paid and cancelled by the testator, on which there was an endorsement by the testator, that by agreement between A. and B. they were to be charged to the account of A. and the bonds were for that reason cancelled. The endorsement was prior to the date of the will. It was held, that if the debt had been proved, it would not have been released or extinguished by the legacy.
Rickets and wife v. Livingston, 97.

Cases and authorities, 103, n. (a.)

2. A. devised his lands to his two sons, charged with the payment of specific sums by each to his executors, and bequeathed to his granddaughter, two hundred pounds, to be paid to her when she came of age out of the sums so directed to be paid by his sons to his executors. It was held, that the legacy to the granddaughter, carried interest from the time it was due, and not before; and that it was due when the legatee arrived at the age of twenty-one years.

Van Bramer and wife v. The Executors of Hoffman, 200.

3. Where a legacy is given to a child, payable at a particular time, and no

provision is made for its maintenance, equity will decree interest from the testator's death, by way of maintenance. But this rule does not apply to a legatee who is a grandchild. Per *Radcliff, J. Id.*

4. If a legacy be charged on land, and no time of payment is mentioned in the will, the rule is that it shall carry interest from the time of the testator's death. Per *Radcliff, J. Id.*

Cases and authorities, 202, n. (a) ; 203, n. (a.)

5. A. devised lands to the use of his wife for life, and to B. in fee, and if he died before arriving at full age, then to the surviving brothers of B. in succession, if of full age, then to the first son of his niece M. and his heirs and assigns for ever, and in default of such issue, remainder over to his own right heirs ; and directed that in case his wife should die before B. or his surviving brother should be of age, then his niece M. should take possession of the lands until his heir should be of age. The wife and niece of the testator both died before B. came of age. It was held that B. had a vested interest in possession, on the death of the widow, and that the devise to the niece failed. *Jackson ex dem. Beach v. Durland*, 314.
6. Where the whole property is devised with a particular interest given out of it, it operates by way of exception. *Id.*
7. Where an absolute property is given, and a particular interest is given in the mean time, as until the devisee comes of age, this will not operate as a condition precedent, but as a description of the time when the remainder-man is to take possession. *Id.*
8. Where a precedent limitation, by any means whatever, fails, the subsequent limitation takes effect. *Id.*

WITNESS.

I. Attachment against. II. Interested.

1. Broker.
2. To Devise.

I. Attachment against.

1. Where a witness refuses to obey a subpoena, which has been regularly served upon him, the court will grant an attachment against him, in the first instance. *Andrews v. Andrews*, 109.

Cases and authorities, 110, n. (b.)

II. Interested.

1. Broker.
2. A money broker, who had advanced money on a note, and deducted a premium of two per cent. per month, is a competent witness, in an action brought by a subsequent holder against an endorser to prove that the note was passed for no more than the legal rate of interest.

Jones v. Hake, 60.

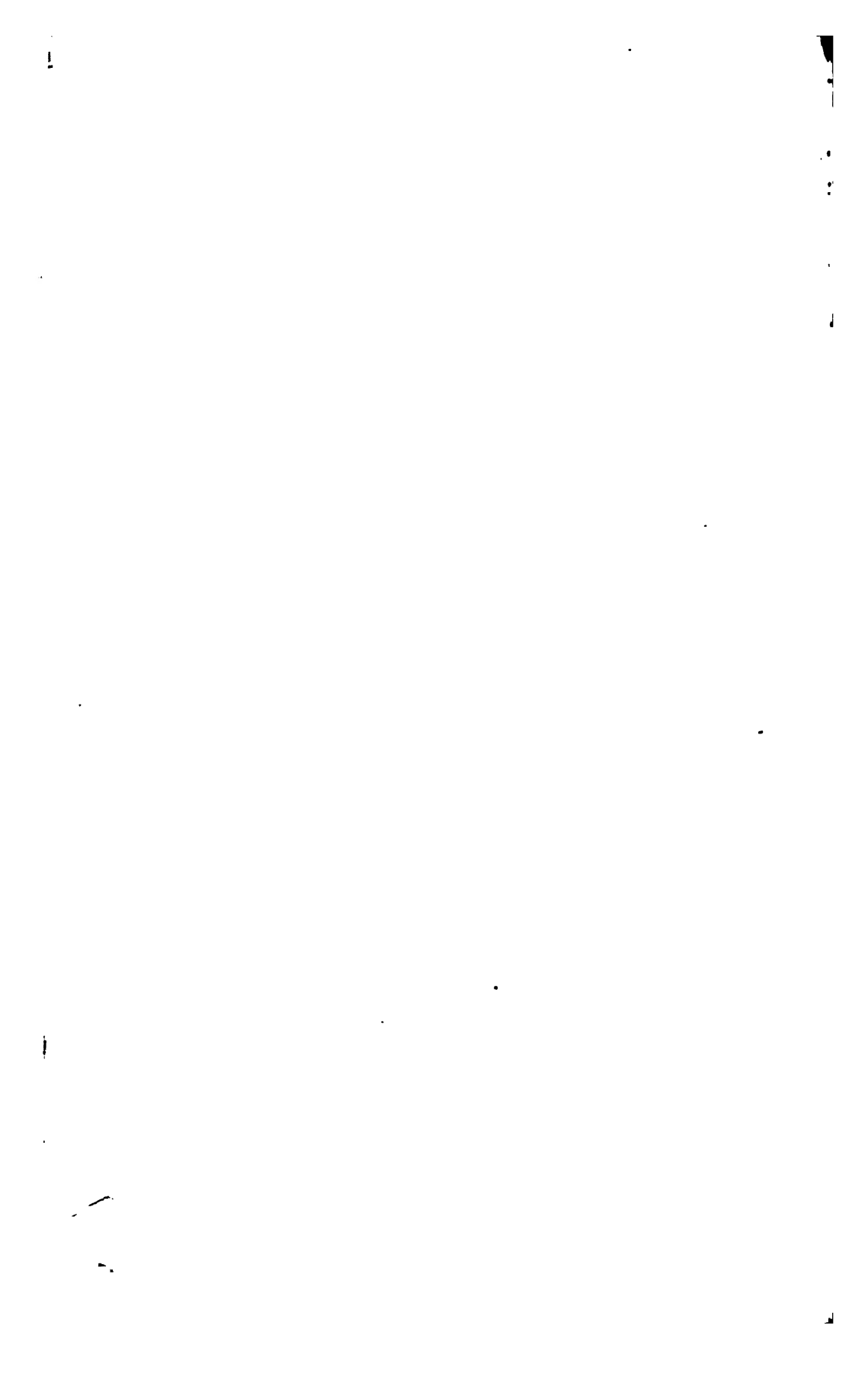
Cases and authorities, 62, n. (b.)

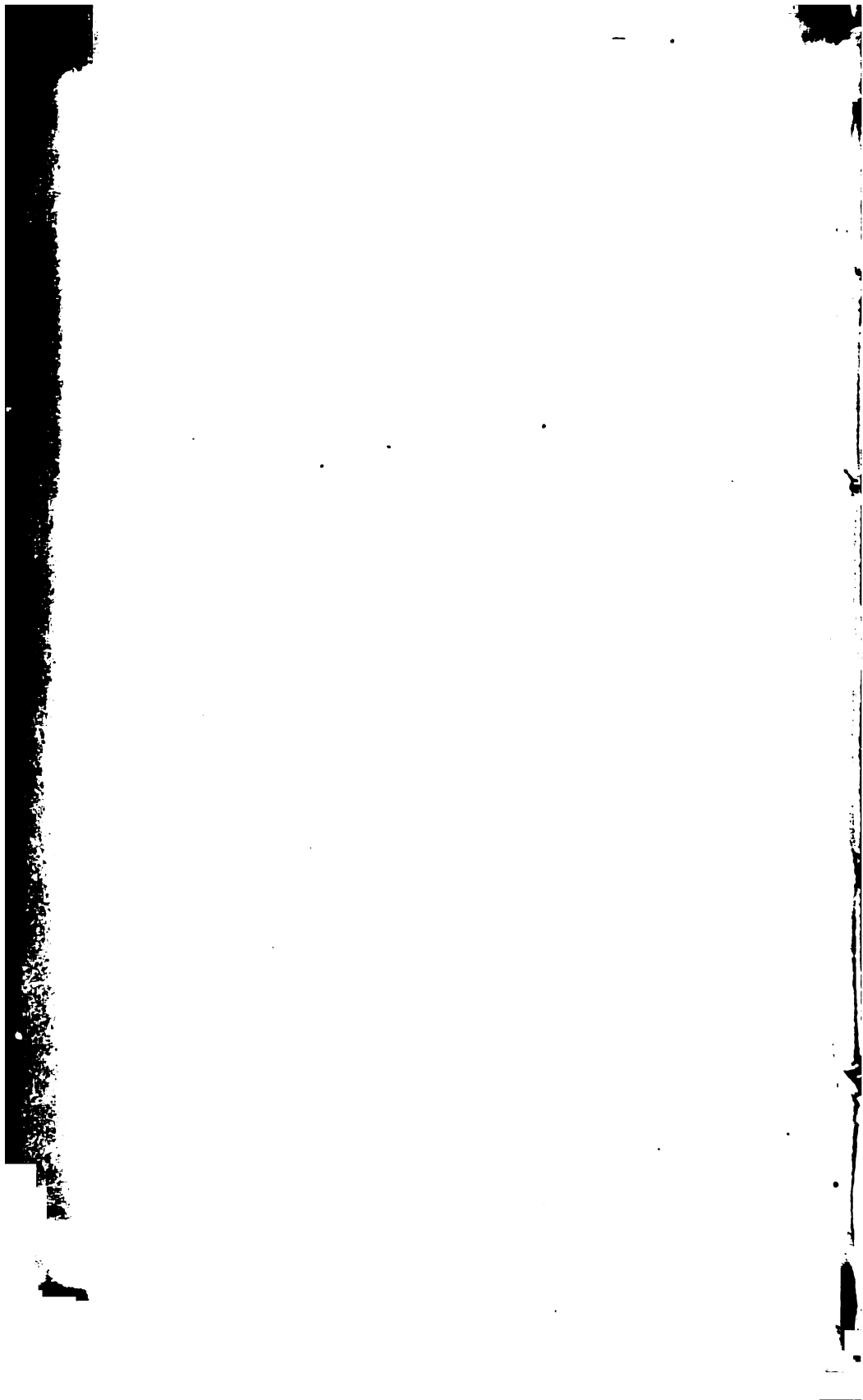
2. *To Devise.*

5. Where a husband is witness to a will containing a devise to his wife, such devise is void, and the husband is a competent witness.

Jackson ex dem. Beach v. Durland, 314.

See TRIAL.





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